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SUB-NATIONAL IMMIGRATION REGULATION AND THE PURSUIT OF CULTURAL COHESION

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The past several years have witnessed a significant increase in the volume of state and local laws related to immigration, many of them attempting to increase law enforcement efforts, and deny residency, public benefits, and employment to undocumented immigrants. Ostensibly erected for resource-guarding reasons, these sub-national regulations act as legally constructed walls, closing off local communities to migrants. Proponents of such measures also contend that sub-national closure—especially in the shadow of lax national border control—is critical to cultural stability and preservation. This Article maintains that resource-guarding rationales are proxies for culture-based exclusion. As such, this Article argues that policymakers at national and sub-national levels should focus on the viability of the cultural arguments underlying exclusionary legislation. Such analysis will ultimately conclude that sub-national immigration regulation is neither the only, nor most effective, method for promoting community cohesion and stability. Because state and local laws aimed at excluding immigrants cannot actually achieve their purpose—i.e., preserving the cultural status quo—sub-national entities should abandon their barrier-building. Community culture will change and evolve regardless of the presence of undocumented persons. In addition, constitutional constraints and economic incentives limit the degree of closure any sub-national community could hope to achieve. This Article then demonstrates that national or sub-national units can create and maintain stable, culturally distinct communities without building physical or legal walls. Indeed, the current spectrum of local response to national border policy—with some localities electing to embrace and include undocumented immigrants—demonstrates that sub-national inclusiveness can also serve community cohesiveness. A more generous immigration policy will not de-stabilize sub-national communities, and therefore these communities need not, and should not, exclude putative members, regardless of citizenship status.

"Hazelton is a small city, an All-American city. . . . Let me be clear. This ordinance is intended to make Hazleton one of the most difficult places in the U.S. for illegal immigrants. . . . We deal with illegal immigration every single day. In Hazleton[, it] is not some abstract debate about walls and amnesty, but it is a tangible, very real problem."[1]

—Testimony of Louis Barletta, Mayor, City of Hazelton, Pennsylvania, U.S. Senate Committee on the Judiciary, Hearing on Comprehensive Immigration Reform, July 5, 2006.

INTRODUCTION

In response to the federal government's decision to build a fence along a portion of the U.S.-Mexican border, the mayor of Eagle Pass, Texas, one of the border towns along which the fence will run, suggested that instead of a national fence, cities in middle-America should erect their own barriers if they felt truly threatened by Mexican immigration.[2] Although impractical, his point was that the national political community's decision to physically wall-off the border did not reflect the sentiment of his local community. In fact, Mayor Chad Foster's suggestion is a common opinion along the Texas-Mexico border, in many towns directly and daily affected by undocumented migration.[3] In addition to believing a border wall is mostly symbolic,[4] an inefficient use of public funds, and ineffectual,[5] U.S. citizen-residents of

1. *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11–13 (2006) (statement of Hon. Louis Barletta, Mayor, City of Hazelton, Pa.).

2. *Fighting the Fence: Texans and Owls Take on the Federal Government*, ECONOMIST, June 14, 2008, at 42, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=11553857 ("'There's a misconception in mid-America that Mexico is overrunning the borders,' says [Mayor Chad Foster]. He suggests that the rest of America fence their own communities if they feel insecure.").

3. David Martin, *Texas Mayors Oppose Plan for Border Fence*, NPR.ORG, Oct. 16, 2007, http://www.npr.org/templates/story/story.php?storyId=15315131. Please note that throughout this article I will refer to undocumented persons as neither "illegal" nor "aliens." The term "alien" carries pejorative connotations that emphasize the strange foreignness of individuals who may have significant ties to the communities in which they reside. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303 (1977).

4. Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 POPULATION & DEV. REV. 303, 314 (1999) ("Faced with mounting public pressure to control immigration . . . politicians in many developed countries have turned increasingly to symbolic policy instruments to create an appearance of control . . . .").

5. WAYNE A. CORNELIUS ET AL., IMMIGRATION POL'Y CTR., CONTROLLING UNAUTHORIZED IMMIGRATION FROM MEXICO: THE FAILURE OF "PREVENTION THROUGH DETERRENCE" AND THE NEED FOR COMPREHENSIVE REFORM 2–5 (2008), http://www.immigrationpolicy.org/images/File/misc/CCISbriefing061008.pdf.

Texas border towns may feel differently than other members of the national citizenry in part because they share ethnic, religious, and linguistic backgrounds with Mexican migrants. For example, eighty-percent of El Pasoans are of Hispanic descent, and most treat Juarez, Mexico, located directly across the border, as a combined economic unit with El Paso.[6]

The demographics of most other U.S. localities differ significantly from that of Eagle Pass and El Paso. Perhaps this is why over the past several years many jurisdictions within the nation have followed Foster's suggestion. Anticipating federal inaction and ultimately frustrated by Congress's inability during its 2005-2006 sessions to create new federal legislation governing immigration and border control,[7] several sub-national political communities took regulation of immigrants into their own hands. Unable to build physical walls around their borders like the federal government, cities like Hazelton, Pennsylvania erected legal barriers to deter, exclude, and rid their communities of immigrants, especially undocumented ones.[8] This surge of sub-national legal wall-building[9] includes measures to penalize residential renting to

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6. *Living Together: El Paso*, ECONOMIST, June 28, 2008, at 39, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=11637349.

7. *See, e.g.*, Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34, *available at* http://www.nytimes.com/2006/12/07/us/07altoona.html?scp=11&sq=hazleton&st=nyt ("When places like Altoona pass such laws, it is a sign of growing frustration with the federal government's lack of immigration enforcement, said Ira Mehlman, spokesman for the Federation for American Immigration Reform."); Jon Hurdle, *Judge Strikes Down Town's Immigration Law*, N.Y. TIMES, July 26, 2007, at A14, *available at* http://www.nytimes.com/2007/07/26/us/26cnd-hazleton.html?scp=2&sq=hazleton%20ordinance&st=cse; Carl Hulse, *Effort to Pass Immigration Bill Collapses in Senate*, N.Y. TIMES, Apr. 7, 2006, *available at* http://www.nytimes.com/2006/04/07/washington/07cnd-immig.html?scp=47&sq=immigration%20bill%20congress&st=cse; Adam Nagourney, Carl Hulse & Jim Rutenberg, *Bush's Immigration Plan Stalled as House G.O.P. Grew Anxious*, N.Y. TIMES, June 25, 2006, at A1, *available at* http://www.nytimes.com/2006/06/25/washington/25bush.html?scp=1&sq=Bush%E2%80%99s%20Immigration%20Plan%20Stalled%20as%20House%20G.O.P.%20Grew%20Anxious&st=cse.

The Hazleton City Council passed its Illegal Immigration Relief Act ordinance which penalizes businesses for hiring undocumented workers and landlords for renting rooms to them in July 2006. Hurdle, *supra*. In response to the federal judge's rule that the ordinance was illegal, Hazleton's mayor, Mr. Barletta stated that the fight was to "make Hazleton the toughest city in America for illegal immigrants" and he "will not sit back because the federal government has refused to do its job." *Id.*

8. *See, e.g.*, Alex Kotlowitz, *Our Town*, N.Y. TIMES MAGAZINE, Aug. 5, 2007, at 32–33 (noting that over the past 2 years, "more than 40 local and state governments have passed ordinances and legislation aimed at making life miserable for illegal immigrants in the hope that they'll have no choice but to return to their countries of origin," and that the individuals were elected to the Carpentersville, IL board to help the city "do everything in its power to discourage illegal immigrants from settling there").

9. *See, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATURES, OVERVIEW OF STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION JANUARY–MARCH 2008, at 1 (2008), http://www.ncsl.org/print/immig/immigreportapril2008.pdf (noting that as of the end of 2007, state legislatures had introduced over 1,169 pieces of legislation, tripling the number introduced in 2006).

undocumented migrants,[10] deny public benefits and welfare assistance,[11] empower local police to discover citizenship status,[12] restrict drivers' licenses and government-issued identification,[13] deny or restrict admission to publicly-funded higher education,[14] restrict employment opportunities,[15] and deter the use of foreign languages.[16]

That border control and undocumented immigration[17] have spawned significant backlash from the American citizenry is not surprising. The national border has long been one of the most contested terrains in the American political and legal landscape.[18] Throughout the nation's history, when the U.S. economy has turned downward towards recession, and financial distress has afflicted millions of Americans, immigrants have been convenient scapegoats for the nation's ills.[19] Our

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10. *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006). *See also* Valley Park, Mo., Ordinance 1715 (Sept. 26, 2006), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_amendedordinance.pdf; Hazleton, Pa., Ordinance 2006-40 (Dec. 26, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_thirdordinance.pdf; Farmers Branch, Tx., Ordinance 2892 (Jan. 2, 2007), *available at* http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf; H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007).

11. *See, e.g.*, H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007) (terminating, inter alia, public assistance with exceptions for emergency care).

12. *See, e.g.*, GA. CODE ANN § 42-4-14, (2008); OKLA. STAT. ANN. tit. 22, § 171.2 (West 2008) ("When a person charged with a felony or with driving under the influence . . . is confined . . . a reasonable effort shall be made to determine the citizenship status of the person so confined."); H.B. 2582, 47th Leg., 2d Reg. Sess. (Ariz. 2006), *available at* http://www.azleg.gov/legtext/47leg/2r/bills/hb2582h.htm (authorizing peace officers to "investigate, apprehend, detain or remove aliens").

13. *See, e.g.*, H.B. 366, 59th Leg., 2d Reg. Sess. (Idaho 2008) (prohibiting the issuance of a driver's license to undocumented persons).

14. Mary Beth Marklein, *Illegal Immigrants Face Threats of No College*, USATODAY.COM, July 7, 2008, http://www.usatoday.com/news/education/2008-07-06-Illegaled_N.htm ("In the past two years, Arizona, Colorado, Georgia and Oklahoma have refused in-state tuition benefits to students who entered the USA illegally with their parents but grew up and went to school in the state. . . . This summer, South Carolina became the first state to bar undocumented students from all public colleges and universities. North Carolina's community colleges in May ordered its 58 campuses to stop enrolling undocumented students after the state attorney general said admitting them may violate federal law."); *see, e.g.*, S.C. Res. 1031, 47th Leg., 2d Reg. Sess. (Ariz. 2006), *available at* http://www.azleg.gov/legtext/47leg/2r/bills/scr1031h.pdf.

15. *See, e.g.*, H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (prohibiting the hiring of undocumented workers and sanctioning employers for doing so).

16. *See, e.g.*, CAL. CONST. art III, § 6(b) (1986) (requiring English to be the "language of instruction" in CA schools and constitutionality affirmed by Cal. Teachers Assoc. v. Davis, 64 F. Supp. 2d 945 (C.D. Cal. 1999) (finding that the limitation of only "instruction" in English did not chill speech or restrict liberty of students and teachers)); GA. CODE ANN. § 50-3-100 (West 2006).

17. Estimates put the number of undocumented immigrants in the country at 11 million as of March 2005. JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005), http://pewhispanic.org/files/reports/44.pdf.

18. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275 (1875).

19. *See generally* ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939 (1974); Kitty Calavita, *The New Politics of Immigration: "Balanced-Budget Conservatism" and the Symbolism of Proposition 187*, 43 SOCIAL

current historical moment is no different. What is significant now, however, is the fact that the current reaction is pronounced at the sub-national level, while the federal legislature remains deadlocked. A measure of the significance of this shift is the recent proliferation of legal academic literature on the subject.[20]

In comparison to the academic literature that examines the legality and utility of sub-national immigration regulations,[21] this Article analyzes culture-based reasons for these state and local reactions. It applies the insights of cultural theorists to the sub-national phenomena detailed by immigration-federalism scholars. As the Texas border-town response suggests, citizens in other sub-national jurisdictions attempting to exclude undocumented migrants may be trying to protect something more than their economic fortunes when they erect legal barriers to shut out newcomers. Specifically, sub-national political communities, as part of their process of self-definition, attempt to exclude outsiders to preserve their culture, including their racial, religious, and linguistic hegemony, and their shared heritage.[22] They attempt this preservation because cultural homogeneity helps ensure community cohesiveness, which in turn promotes political and social stability for that political unit. Proponents of national and sub-national closure believe that increased immigration, especially undocumented immigration and immigration primarily from one country will erode the current culture of their communities, eventually leading to disconnectedness and instability.

This Article critiques the notion that, in response to increased immigration or lax border control, sub-national entities must close themselves off to maintain their cultural cohesiveness and stability. Built into this theory of federal/sub-federal causality are three implicit

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PROBLEMS 284, 284–85 (1996).

20. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57.

21. *See* Huntington, *supra* note 20 (examining the constitutionality of sub-federal legislation); Rodriguez, *supra* note 20 (arguing that localities play an important role in integrating immigrants, and therefore should be afforded latitude to legislate); Schuck, *supra* note 20 (arguing that allowing sub-national entities to regulate immigration has not led to an anticipated race to the bottom).

22. Stephen R. Perry, *Immigration, Justice, and Culture*, *in* JUSTICE IN IMMIGRATION 94, 110–25 (Warren F. Schwartz ed., 1995); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 38–40 (1983).

Indeed, early national immigration policy was expressly based on the notion of preserving cultural homogeneity by excluding non-Anglo, non-Protestant, and non-English-speaking foreigners. Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1383–85 (2005).

assumptions that this Article refutes. First, the theory presumes that closure will preserve a community's culture. Second, it presupposes that closure is practically and substantially attainable by a sub-national community. And, third, it assumes that legal wall-building will be the only response by sub-national communities to increased immigration that may threaten the cultural status quo. This Article does not dispute that national immigration policy foments sub-national responses. Nor does it contest the idea that political communities strive for stability through cultural connectedness. However, this article argues that cultural cohesion need not be pursued through closure. Examining those communities that have responded to current immigration levels through closure, I argue that exclusion of undocumented immigrants will not maintain their cultural status quo. In addition, the communities' potential for culture-based closure is significantly constrained by constitutional prohibitions and economic realities. Indeed, considering the current spectrum of sub-federal responses to the presence of undocumented immigrants, states and localities also define themselves and respond to increased immigration through inclusion. Importantly, an inclusive response is not antithetical to the pursuit of cultural cohesion and stability.

The critical contribution this Article makes to immigration and constitutional scholarship is its challenge to the legislative rationale that sub-national legal closure is both necessary and conducive to the stability of political communities. Existing bi-directionality in state and local legislative reactions to current levels of documented and undocumented immigration serve as evidence of a more nuanced set of sub-national responses to migration-induced cultural change. Compared to the inability and impracticality of closure as a path to preserving contemporary iterations of culture, inclusive jurisdictions seek cohesion either because of, or despite, their welcoming of newcomers into their community. Based on this analysis, this Article promotes the following legislative and doctrinal reorientations: (1) Political communities at any level should abandon cultural preservation as a public policy goal; (2) Courts must restrict use of the plenary power doctrine because of the imbalances it creates between overlapping membership communities at the national and sub-national levels; and (3) Sub-national entities are encouraged to employ inclusionary public policies to serve the cohesiveness and stability of their institutions and communities. In addition, this Article advances the growing body of academic literature questioning the wisdom and legality of limiting immigration and

increasing border enforcement.[23]

Part I explains the importance of preserving cultural bondedness, explaining the connection between it, exclusionary legislation, and well-functioning, stable communities. Having established the significance of cultural cohesion to a political community's survival, Part II explores the limitations of sub-national legal wall-building. The first constraint focuses on what closure can potentially accomplish. Here, the Article debunks the erroneous belief that the barring of outsiders can preserve particular iterations of culture. The second set of constraints is prohibitions on the methods of closure. Unable to exclude on the basis of prominent cultural markers such as race, religion, and language, sub-national entities turn to economic deterrents that only crudely, if at all, serve the goal of cultural cohesion. Given the limited effectiveness of legally constructed barriers, Part III investigates the alternative ways for communities to achieve connectedness and stability. Most importantly, this Article argues that the decision by some states and localities to accommodate, and even welcome, undocumented persons into their fold demonstrates that closure is neither an inevitable response to lax border control, nor the only path to self-definition, cultural cohesion, and community stability. In short, neither wire fences nor legal walls are critical to national or sub-national well-being.

I. SUB-NATIONAL LEGISLATION AND THE IMPORTANCE OF CULTURAL COHESION

Before critiquing sub-national closure, Part I.A explains the linkage between national border policy and sub-national reaction. In addition, Part I.B will establish the reason why political communities, at any level, choose to exclude outsiders. Assessing a few theories regarding the necessity of exclusion to a political community, this Article settles on justifications for closure that relate to the role cultural cohesion may play in allowing for well-functioning political and social institutions. Having established the connection between exclusion, cultural commonality, and stable institutions in this section, Part II will then critically evaluate the limitations of using legal closure as the means to cultural preservation.

23. *See generally* Tamar Jacoby, *Immigration Nation*, FOREIGN AFF., Nov.–Dec. 2006, at 65; Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193 (2004); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157; Perry, *supra* note 22, at 110–25.

A. The Relationship Between National Border Control and Sub-national Immigration Regulation

The notion of a feedback loop between national border laxity and sub-national closure was most famously articulated by the political philosopher Michael Walzer in *Spheres of Justice*. Walzer's key insight justifying a political community's control[24] over its national border and the exclusion of outsiders is the causal relationship between national border control and sub-national reaction. Walzer provides an instrumental justification for a highly regulated national border under complete sovereign control. In his analysis, a political community's strict control over its national borders is critical because such exclusion serves the goal of greater domestic inclusion.[25] Spared from the threat of uncontrolled migration and the concomitant changes it brings, local communities will continue to be distinct, cohesive, and stable. In sum, when assured of a regulated territorial border at the federal level, sub-national entities—states, counties, localities, neighborhoods—are less likely to close themselves off, and more likely to allow free access, movement, and membership.

The hypothesized causal connection between federal and sub-federal units permits us to understand sovereign border control as sound policy rather than pre-ordained power. In contrast, the Supreme Court's early understanding of the national exclusion power rested on fiat instead of reason.[26] The Chinese Exclusion cases opined that unfettered control of immigration decisions was inherent in the very notion of sovereignty and needed no independent constitutional justification.[27] However, in our current era of globalization, with free and rapid trans-national movement of goods, services, and capital,[28] and in an era of thinning

24. WALZER, *supra* note 22, at 39 (stating that a "sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants," but also proscribing majoritarian decisions on immoral basis, and requiring sovereignties to aid necessitous strangers).

25. *Id.* at 39.

26. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

27. *See supra* note 26.

28. Richard T. Ford, *City-States and Citizenship*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 209, 210–11 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, *in* JUSTICE IN IMMIGRATION, *supra* note 22, at 158, 158–68.

sovereignty,[29] when state actions are not beyond the reproach of international law,[30] the Supreme Court's thick notion of national sovereign power is anachronistic.[31]

In contrast, Walzer's theory justifies border control based on the value of "distinctiveness" to a political community.[32] Although Walzer does not define distinctiveness, the logical elucidation of his meaning suggests that he conceptualizes a cohesive community culture that binds incumbent members and has traits and features that are identifiable and particular.[33] Therefore, throughout this article, the good that political communities seek through legal-wall building is referred to as cultural cohesion.

Sub-national regulation intended to exclude undocumented migrants, then, responds to the perception that lax border control will degrade the cultural ties among incumbent community members. Conversely, however, if neighborhoods and localities are unable to secure meaningful connectedness, either because constitutional principles forbid the means used to achieve desired levels of cultural homogeneity or because preservation of a cultural status quo is itself an unattainable end, then the openness of national borders is only marginally relevant to sub-national reaction. In addition, if closure and exclusion are

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29. SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION 59–99 (1996); Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1, 68–70 (2004).

30. Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 324–44 (2008); *see also* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 25 (2006) ("While nation-states continue to define the nature and scope of most rights, as well as to enforce them, states can no longer be said to be the sole source of existing positive rights. As is well known, the international human rights regimes that developed in the post-World War II period were designed to implement supranational standards for the treatment of individuals by states.").

31. Seyla Benhabib, *Political Theory and Political Membership in a Changing World*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 404, 406–07 (Ira Katznelson & Helen V. Milner eds., 2002) ("[T]he state-centric system of the nineteenth and early twentieth centuries—is, if not at an end, at a minimum undergoing a deep reconfiguration."). More recent Supreme Court decisions still rely on conceptions of sovereign power first articulated over 130 years ago, prior to the advent of electronic communication, international institutions, rapid travel, and trans-national human rights norms. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

32. WALZER, *supra* note 22, at 39 ("The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people (though some of them are global pluralists, and others only local loyalists) seem to believe, then closure must be permitted somewhere. At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.").

33. *Id.* at 62 ("Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life." (emphasis omitted)).

unnecessary for cultural cohesiveness and political stability, sub-national communities should refrain from enacting restrictive immigration regulation in the name of cultural preservation.

Part I.B discusses the first of these questions—whether cultural cohesion is a public good worth achieving. Part II takes up analysis of the remaining questions regarding the potential for closure to achieve cohesion and stability.

B. The Importance of Cultural Cohesion and Continuity

Assuming that national border policy may foment sub-national closure, to justify exclusion of newcomers from a local political community, there must be some account of what current members are trying to accomplish through that exclusion. One such focus is the relationship between exclusion and community stability. A political community will exclude putative members to maintain the cultural status quo, which for incumbent members is presumably identifiable and distinctive. The persistence of the incumbent, dominant culture, in turn, provides the commonality and bondedness necessary to stabilize political and social institutions.[34] In short, because sub-national political communities strive for stability and survival, they legislate to preserve the bonds that ensure that stability and survival.

One method of preserving the current bondedness and commonality of a community is to erect legal walls to exclude putative members, especially undocumented immigrants, who may not share the dominant cultural traits of the incumbent residents. Those outsiders may introduce new practices, social customs, racial and religious backgrounds, and languages that endanger the cohesiveness of the existing political community. Depending on the justification proffered, however, sub-national legislation may or may not be defensible. I discuss below three potential justifications for laws that bar outsiders, settling on the justification that defends exclusion only at the hypothetical moment when immigration threatens the very existence of the political community itself. Ultimately, I adopt Professor Stephen Perry's conception of justice in immigration law, and take the position that the U.S. is not nearly at the point when closed borders and limited

34. Perry, *supra* note 22, at 113–14 ("a certain degree of cultural stability and cohesiveness is necessary to preserve either general social and political stability or the liberal/democratic character of existing political institutions"); *see also* Johnson & Hing, *supra* note 22, at 1390 ("We recognize that even a multicultural society must share a core of values in order to provide a means to live together as a society. Without a commitment to a common core, balkanization into assorted factions is likely and eliminating interethnic violence and tension will prove more difficult.").

immigration are necessary.[35] Nevertheless, this analysis demonstrates that sub-national exclusion can potentially be justified by its relationship to community stability. Later sections will then wrestle with the question whether exclusion is the best, or only, regulatory path to community stability and survival.

The first untenable justification for exclusion of outsiders relies on a version of American culture tied to a particular vision of the nation's ethnic, religious, and linguistic roots. Convincing skeptics to ratify the Constitution, John Jay's vision of the emerging constitutional order explicitly endorsed the virtues of a specific type of cultural homogeneity:

> With equal pleasure I have as often taken notice, that Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . . .[36]

Inaccurate as it was even in the late 1700's, decades of forced migration of slaves, imperial conquest, and steady immigration have certainly complicated Jay's vision of cohesion through ancestral, linguistic, and religious homogeneity.[37]

Despite these intervening demographic shifts, some contemporary scholars still advocate a return to the cohesiveness created by the shared ethnic and religious backgrounds of a bygone era.[38] Importantly, this justification for border closure does little to distinguish between documented and undocumented persons, as it focuses not on formal legal status, but immutable and deeply held characteristics of putative members. At base, closure based on a specific ethno-cultural dominance or homogeneity amounts to the claim that the state's role is to protect the majority's culture.[39] This claim, however, is anathema to the purpose of

35. *See* Perry, *supra* note 22, at 114.

36. THE FEDERALIST NO. 2, at 32 (John Jay) (Clinton Rossiter ed., 1999).

37. I am not defending a static understanding of culture that limits cultural definition to these identities. I discuss them throughout the Article because they map current political and legal understandings of the constituent parts of culture. Under any definition of culture, however, it is likely true that these identities significantly inform the ways in which individuals comprehend and interact with the world. *Cf.* Samuel Scheffler, *Immigration and the Significance of Culture*, 35 PHIL. & PUB. AFF. 93 (2007).

38. *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004); *see also* Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 133 (2008) (identifying, without endorsing, scholars who take this view).

39. Perry, *supra* note 22, at 111.

establishing liberal democracies such as the United States.[40] State-enforced cultural protection requires extensive governmental involvement in decisions affecting deeply-held social, sexual, moral, and religious matters, and is the hallmark of autocratic or theocratic regimes.[41] While many federal and sub-federal policies in the U.S. may seek to advance hegemonic views of cultural majorities, it is difficult to make the case that the very purpose of governmental entities is to protect these cultural expressions. The Constitution identifies its own purpose in culturally non-specific terms: "to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[42] Combined with its prohibitions on religious establishments,[43] and its creation of a counter-majoritarian judiciary,[44] any governmental protection of the dominant culture may be a by-product of a liberal democratic system, but not its goal.

In comparison, a justification for closure based on the value of the collective act of excluding is less prejudicial, but ultimately indefensible as well. Legal scholars like Frederick Schauer posit that political communities can and should exclude because of the good feelings that exclusion produces for the "in" group.[45] Under this perspective, the very act of jointly excluding outsiders forms the basis for commonality and connectedness within the incumbent community. That is, the exclusion is not necessary to serve another purpose other than to act as the bonding agent for those voting for closure. This perspective, however, provides scant justification for public policy when measured against the disutility of exclusion to outsiders.[46]

Any position that celebrates the act of collective exclusion itself as its goal is unpersuasive as a reason to allow sub-national entities to limit membership and residency to incumbents. First, as Professor Aleinikoff argues, the good feelings generated for the community by exclusion are

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40. *Cf.* Angel R. Oquendo, *National Culture in Post-National Societies*, 50 VILL. L. REV. 963, at 972–73 (2005).

41. *See, e.g.*, SAUDI ARABIA CONST. arts. 9, 13, 34.

42. U.S. CONST. pmbl.

43. U.S. CONST. amend. I.

44. Marbury v. Madison, 5 U.S. (Cranch) 137 (1803) (declaring an act of Congress void); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

45. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1517 (1986) ("In preferring some, we of course do not prefer others, and it is in a way sad and in a way paradoxical that we hold ourselves together by fencing others out. But that it is sad and paradoxical does not make the phenomenon less real.").

46. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990).

thin justification for exclusion.[47] Compared to the gravity of economic, social, and political claims of outsiders seeking admission, positive feelings alone cannot validate complete denial.[48] Second, Schauer's position has no apparent starting or stopping point. Logically, so long as outsiders exist, collective exclusion can perform its function of bonding the polity and generating good feelings. In other words, hordes of undocumented persons could enter the country and then participate in the collective exclusion of other outsiders. Standing alone, exclusion for exclusion's sake does not distinguish between the presence of undocumented and documented immigrants.

Also, collective exclusion in and of itself does not provide an explanation as to how or why the political community will be better served, better stabilized, or better equipped for long-term survival. The shared exclusionary impulse is temporary glue for a political community. While good feeling generated by collective exclusion may provide an immediate injection of faith and pride in shared institutions, over time, the fragility of the bond will not serve to facilitate agreement on internal distributional concerns or other public policy goals. In short, as a moral, logical, and instrumental matter, theories of collective exclusion for no other reason than to harvest the feelings generated by that collective act, do not sufficiently explain why political communities desire to limit membership.

In contrast to either exclusion to protect a specific demographic character or exclusion for its own sake, Professor Perry presents a more defensible justification for restricting entry into political communities.[49] By rejecting outsiders, especially outsiders who do not share the dominant culture of the incumbent majority of citizens, the current polity stands a greater chance of preserving those traits, practices, and traditions that have thus far bonded them together. This connection formed by shared identity characteristics, practices, and mores is a thick binding agent, ensuring the community will have some common foundation to inform their lives together as a political entity. Perry elucidates that a community's claim to use state coercion to exclude outsiders is triggered only when the addition of immigrants will so drastically change the incumbent community's culture as to cause

47. *Id.* at 28.

48. *See* Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES L. 367, 370 (2007) (arguing that opportunities and rights flowing from national citizenship gained through birth are like "inherited property" and that citizens in wealthy countries have an obligation to those born in other states).

49. Perry, *supra* note 22, at 104.

instability in the institutions of everyday life and governance.[50] As he notes, this moment when new members—whether documented or undocumented—will jeopardize the existence of the community itself is too distant to justify current movements to close national and sub-national borders.[51] However, because it provides a legitimate basis for the current spate of sub-national legislative reactions, this Article presumes that sub-national communities exclude because they perceive immigrants as threats to their incumbent culture, and by extension, to the stability of their political and social institutions.

This justification, based on the stability and survival of the political community's institutions, provides plausible explanations for a sub-national entity's compulsion to exclude undocumented migrants. Institutional stability and promotion of autonomy are critical to the functioning of the U.S. democracy or that of any liberal democratic state, and are stated goals of the Constitution itself.[52] Moreover, the causal link for this explanation is lucid. A political community—at either the national level, or at the sub-national level—in response to an influx of immigrants who do not share the dominant culture of the majority of the community, will seek to exclude and limit those immigrants so that their dominant culture will not be threatened or changed. A stable dominant culture provides a deep bond between the community members, contributing to the ability of their governing institutions to continue functioning effectively.[53] In short, it helps insure domestic tranquility.

Accepting that institutional stability sufficiently explains the importance of cultural cohesion and preservation to a political community, Part II probes constraints on the pursuit of that cohesion through closure.

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50. Of note, and for the sake of completeness, Perry also presents another plausible justification for exclusion based on a shared culture's ability to promote individual autonomy by providing structure and context for individual flourishing. *Id.* at 115–17. In this conception, the state's exclusionary power should be used to facilitate the autonomy and expressive needs of incumbent members. *See also* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 163–66 (1989). This justification could also find support within our constitutional order. U.S. CONST. amend. I. However, it does not merit further discussion here because each individual will have varying thresholds for the level of cultural homogeneity he or she requires for his or her autonomous expression. It does not aid in elucidating the limits of exclusionary legislation.

51. *See* Perry, *supra* note 22, at 114.

52. U.S. CONST. pmbl. ("to form a more perfect union").

53. Perry, *supra* note 22, at 115.

II. PROSCRIPTIONS ON SUB-NATIONAL PURSUIT OF CULTURAL COHESION THROUGH CLOSURE

Having established that sub-national entities respond to national immigration policy and that a cohesive culture helps stabilize community institutions, this Article now turns to the method employed by many sub-national communities in recent years to maintain their cultural connectedness—closure and exclusion. The first two sub-sections of Part II, debunk the first two assumptions built into the theory of sub-national closure. Part II.A argues that closure will not succeed in preserving the cultural status quo. That is, whatever current version of culture a political community is attempting to protect, cannot be maintained over time even if all immigrants and newcomers were excluded. Part II.B then presents the constitutional and economic constraints on achieving effective closure. Sub-national communities are limited to economic deterrents that only roughly, if at all, help maintain a distinctive dominant culture. Part II.C then critiques the judicially created doctrine—the plenary power doctrine—courts used to evaluate the viability of sub-national exclusionary legislation.

A. Cultural Preservation as a Self-Defeating Legislative Purpose

This section asserts that exclusion cannot effectively preserve a particular community's culture as it exists at the moment of closure. Relying on legal scholar Madhavi Sunder and her epistemological study of the concept of culture in anthropology and law,[54] and the work of political philosopher Samuel Scheffler,[55] I argue that even if a local community could build a wall around it, either literally or legally, and monitor its borders assiduously, it would not be able to preserve its culture unchanged. As Professor Scheffler argues, a preservationist project for a political community is self-defeating.[56] Culture only survives through evolution and adaptation over time. Localities trying to resist change to their distinctive culture through exclusion and closure engage in a futile and ultimately unfulfilling exercise.

First, a political community would have to agree on the version of its culture it desires to defend and propagate through restrictive regulation.

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54. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

55. Scheffler, *supra* note 37.

56. *Id.* at 107 ("Strong preservationism fails as a strategy . . . because it fails to recognize that change is essential to culture and to cultural survival, so that to prevent a culture from changing . . . would not be to preserve the culture but rather to destroy it. In other words, strong preservationism is self-defeating.").

This preparatory task itself is difficult when one accounts for (1) the temporal requirements of sustained cultural preservation over time,[57] and (2) the likelihood that incumbent community members entered the community at different times. Only localities created by coordinated, mass movement can claim to have all members experiencing roughly the same cultural mode at the point of entry. Therefore, the version of community culture each individual joined varies even between incumbent members. Creating a community-wide endowment effect, each individual within the community will claim entitlement to that specific version of the community that existed when he or she joined, as none will have experience of community culture prior to that moment. But, the very act of joining, like a cultural Heisenberg uncertainty principle,[58] is certain to have altered that locality's culture.

Second, even assuming that individuals entering the community across a period of time could agree on a base commonality of culture going forward, they still would not succeed in faithfully preserving their culture through closure. In Scheffler's thought experiment, even when the community is hermetically sealed in an attempt to maintain a specific version of culture, members would have to account for the changes inevitably wrought by their children—the "immigrants from the future . . . ."[59] Walzer himself notes the analogy between migrants and children, but fails to recognize that posterity will also act as agents of cultural change.[60] Thus, his lament then that open national borders without sub-national closure would lead to short shelf-lives for a community's cohesive culture is overstated. Assuming closed borders, the version of culture that bonds the local community today will not be the same version that does so in a few generations. Indeed, even if the state banned childbirth and sealed its borders, the inevitability of "cultural dissent" among incumbent members, accompanied by the drive for autonomy and human flourishing, would still galvanize cultural modification.[61]

On this point, incumbent members of the political community might argue that they are willing to accept the cultural changes brought by

57. WALZER, *supra* note 22, at 39 ("Neighborhoods might maintain some cohesive culture for a generation or two on a voluntary basis, but people would move in, people would move out; soon cohesion would be gone.").

58. Jan Hilgevoord & Jos Uffink, *The Uncertainty Principle*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2006), *available at* http://plato.stanford.edu/archives/fall2006/entries/qt-uncertainty/.

59. Scheffler, *supra* note 37, at 104.

60. WALZER, *supra* note 22, at 34 ("But it is worth noting first, briefly, that there are certain similarities between strangers in political space (immigrants) and descendants in time (children).").

61. Sunder, *supra* note 54, at 498.

their own children or their own internal disagreement, but not those of undocumented migrants. But once the ground is ceded that culture of a locality and a political community will change, it is unclear why change from one source is unqualifiedly acceptable whereas change from another is unequivocally not. The inevitability of cultural change even within closed political systems belies the argument that cultural status quo is necessary for the survival of a community's political and social institutions.

Moreover, the U.S. cannot become a closed system. This Article has thus far implicitly conceived of federal political authority as actively choosing whether to allow immigration and undocumented migration, and possessing the potential to hermetically seal the border if it so wanted. Increasingly, such absolute control appears to be fantasy.[62] Undocumented migrants from Mexico and other Central and South American countries cross the border fully cognizant of the possibility of death and permanent separation from loved ones.[63] Neither that stark reality nor the increased border vigilance has suppressed the hydraulic push and pull of globalized markets, economic opportunity, and individual rights that draw immigrants.[64] Recent reductions in undocumented immigrant volume are just as, if not more, attributable to downturns in the U.S. economy as they are to effective border policy.[65] Thus, cultural change is certain; posterity, internal cultural dissent, and inevitable global migration are its unstoppable agents.

Even taking the charitable view of the federal government's potential for national border control, only a minority believe that the U.S. would be better-off as a closed system without any immigration.[66] Even vocal anti-immigration activists concede that legalized immigration flows are

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62. *See, e.g.*, Johnson & Hing, *supra* note 22, at 1350 ("[I]mmigration is a function of economic, social, and political pressures that are not wholly within any one nation's sovereign control. Closed borders simply are not a policy option in the United States today.").

63. *See* CORNELIUS, ET AL., *supra* note 5; RAQUEL RUBIO-GOLDSMITH, ET. AL., IMMIGRATION POL'Y CTR., A HUMANITARIAN CRISIS AT THE BORDER: NEW ESTIMATES OF DEATH AMONG UNAUTHORIZED IMMIGRANTS 2–4 (2007), http://immigration.server263.com/images/File/brief/Crisis%20at%20the%20Border.pdf.

64. Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEGAL. F. 93, 96; David M. Kennedy, *Can We Still Afford to Be a Nation of Immigrants?*, ATLANTIC MONTHLY, Nov. 1996, at 52, *available at* http://www.theatlantic.com/doc/199611/immigration.

65. Julia Preston, *Reduction Seen in Number of People Here Illegally*, N.Y. TIMES, Jul. 31, 2008, at A14 ("The [conclusion that strong immigration enforcement caused the decline was] questioned by other demographers and economists, who said the decline might be less than . . . reported and was more likely the result of the weak economy, especially in low-wage construction and manufacturing where illegal immigrants are generally employed.").

66. PEW HISPANIC CTR., NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES: AMERICA'S IMMIGRATION QUANDARY 26–33 (2006), http://pewhispanic.org/files/reports/63.pdf.

often beneficial to the country, and that their concern is with uncontrolled undocumented migration. Under the current immigration code, roughly 1.3 million immigrants legally enter the U.S. every year,[67] including use of visa allocations and admittance of direct family.[68] National policy then, is to recognize the inevitability of, or at least allow for, cultural change through admission of new, documented members. Since the U.S. does not control birthrate, and the Constitution protects parents' rights to raise their child without excessive state coercion,[69] our national rule is to supplement immigrant-caused cultural modification with that caused by immigrants from the future.

While change might be inevitable, and its sources varied, incumbent members might still argue that cultural evolution through their offspring and their internal dissent is controlled and gradual, and therefore not injurious to the cohesion that culture provides. Each member will only produce a limited number of children, and those children will be raised in homes, schools, and institutions that share a common base of values and practices informed by their forbears. Immigration, on the other hand, can import entire families at a time. In addition, those families will arrive with traditions, practices, and understandings of political institutions that could be drastically different from those of the incumbent political community. Thus, while both incumbents and migrants modify community culture, they differ in the quality and degree of that alteration.

The degree and rapidity of cultural change caused by mass immigration is the only legitimate legislative concern for sub-national political communities trying to maintain a cohesive culture. According to Perry:

> [T]he core issue here appears to be the rate of cultural change, not the preservation of an existing culture or cultural mix. What is at stake is cultural continuity rather than the substance of the dominant culture or cultures. . . . [C]ultural change, whether in the form of cultural diversification or transformation within a dominant culture, must be sufficiently gradual as to ensure social and political stability.[70]

The possibility of upheaval caused by too drastic of a cultural shift, may endanger political institutions and community cohesion. Thus, a locality's exclusion of putative members, when the rate of cultural change would destabilize governing institutions and exceed the capacity

67. MIGRATION POL'Y INST., ANNUAL IMMIGRATION TO THE UNITED STATES: THE REAL NUMBERS 1 (2007), http://www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf.

68. 8 U.S.C. § 1151 (2006).

69. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

70. Perry, *supra* note 22, at 114.

of community to integrate new members,[71] is the sole legitimate goal of a preservationist project by a sub-national entity.

Restating the legitimate legislative goal vis-à-vis preservation of a distinctive culture, localities are entitled to exclude outsiders only when new entrants would foment de-stabilizing cultural change. That moment, however, is hypothetical and distant.[72] In our instant moment, sub-national exclusion of immigrants cannot and will not faithfully preserve any particular version of culture, assuming that incumbent members could agree on the iteration of culture they want to preserve. At most, such closure can minimize cultural rate change. Stripped down to this modest goal, sub-national political communities may very well decide that their pursuit is no longer worthwhile. Combined with the limitations on the manner in which they might pursue closure, discussed in Part II.B below, localities will likely opt not to pursue cohesion through exclusion, regardless of national border policy.

B. Constitutional and Economic Obstacles to Sub-national Closure

Despite the impossibility of preserving the cultural status quo, sub-national communities may still choose to pursue the modest goal of cultural change-minimization through closure and exclusion. It would caricature the perspective of sub-national entities to suggest that they strive for complete closure and insularity. However, their restrictive regulation represents their attempts to substantially exclude non-incumbents from their jurisdictions.

Section 1 below surveys the constitutional prohibitions on public and private exclusion based on the culturally significant factors of ethnic background, religious faith, and linguistic commonality. Sub-national communities, whether through public policy or private action, will face significant legal and practical obstacles to achieving substantial closure along these axes. Unable to exclude through racial, religious, and linguistic prohibitions, communities must resort to economic means to bar undocumented persons. Section 2 critiques the use of economic rationales, including zoning, as a method to keep out undocumented persons, arguing that, to the extent these methods are constitutional, they ineffectively promote cultural cohesion.

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71. *See, e.g.*, Gilbert, *supra* note 38, at 136 (noting scholarly literature arguing that the U.S. has an "immigration" policy, but no "immigrant" policy for integration).

72. Perry, *supra* note 22, at 104.

1. Constitutional Proscriptions on Culture-Based Exclusion

Any pursuit of cultural distinction must avoid using "culture" as a proxy for ethnic and religious homogeneity, or other basis antithetical to the liberal democratic principles underlying the Constitution.[73] Here, the Article briefly surveys constitutional constraints on the sub-national closure pertaining to three of the most recognizable signifiers of cultural identity: racial and ethnic makeup, religious background, and linguistic commonality. In light of U.S. history, justifying local pursuit of cultural commonality along these axes carries with it the danger that racist and xenophobic sentiments will masquerade as the goal of cultural preservation.[74] As such, sub-national communities face substantial constitutional hurdles when attempting to preserve their dominant culture through exclusionary policies meant to substantially protect homogeneity of race, religion, or language.

The attempt to envision America as a distinct racial community at the national level,[75] followed by attempts to recreate that character at the sub-national level,[76] was ultimately stymied by the constitutional amendments and jurisprudence of the late-nineteenth and mid-twentieth centuries. The landmark ruling in *Brown v. Board of Education*[77] and its progeny prohibited localities from maintaining racially segregated facilities.[78] The Twenty-fourth Amendment, prohibiting all levels of

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73. WALZER, *supra* note 22, at 40.

There are nations that use racial or ethnic criteria for membership within the political community, or as a marker of a distinct political community. For example, membership in Greece is heavily dependent on Greek descent, with limited opportunities for non-Greeks to achieve the same. *See* Kodikas Ellenikes Ithageneias [KEI] [Code of Greek Citizenship] (Greece), *available at* http://www.mfa.gr/www.mfa.gr/AuthoritiesAbroad/North+America/USA/EmbassyWashington/en-US/Consular+Services/Citizenship+-+Passports/Greek+Nationality/. The Republic of Korea until recently, mandated that social science books teach that all Koreans were united by one-blood without mixture of other ethnicities. This notion of ethnic purity and superiority has recently come under revision in Korea due to the effects of globalization, which has brought spouses from many neighboring countries into familial and blood ties with its native citizens. Korea's response to increased and varied immigration has thus far been to modify its sponsorship of the myth of national racial distinctiveness, rather than create closed sub-national communities. *See All Things Considered: South Korea Tackles Multiculturalism* (NPR broadcast June 23, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=91819092.

74. Chang, *supra* note 64, at 128 n.129; Karla M. McKanders, *From "Coloreds Only" to "Solamente Ingles," the Movement to Dismantle Second Class Citizenship for Jim Crow Blacks and Juan Crow Browns* (forthcoming) (on file with author).

75. THE FEDERALIST NO. 2, *supra* note 36.

76. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8–17 (2004) (discussing Jim Crow laws); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

77. Brown v. Bd. of Educ., 347 U.S. 483 (1954) *supplemented by* Brown v. Bd. of Educ. 349 U.S. 294 (1955).

78. *See id.*

government from instituting poll taxes and levies on the franchise,[79] further undermined the racial exclusivity of the American citizenry by preventing wealth to substitute as a proxy for race at the voting booth. Finally, in addition to these measures that prohibited jurisdictions from segregating and disenfranchising to maintain distinctive racial communities, the Court's anti-miscegenation ruling in *Loving v. Virginia*,[80] prohibited states and localities from attempting to maintain racial purity in future generations through the regulation of marriage.[81] The racial composition of children—future members of the community who may change its cultural character—could not be determined by the state.

Yet, these constitutional movements only determined a political community's ability to harness the power of the state to cement racially homogenous localities through coerced exclusion. They, by themselves, did not control what private individuals might do to maintain racial distinctiveness within their communities. In attempts to maintain the racial composition of their communities, whites included racially restrictive covenants in their contracts to prevent property from being transferred to putative non-white members.[82] Interpreting minimal levels of government involvement to suffice for constitutional review, *Shelley v. Kramer* prohibited racially restrictive covenanting, forcing previously distinct neighborhood to open their doors to all-comers.[83]

Having been stripped of governmental and private means of striving for distinctiveness by race, communities still desirous of racial differentiation are left with voluntary, individual private action that can, at best, only roughly stand as a proxy for racially distinctive public policy. Accompanying the aftermath of desegregation, enfranchisement, and anti-miscegenation decisions, white Americans exponentially increased their move to the suburbs.[84] Currently, the suburb-urban divide in America reflects de facto distinctiveness in local communities by race.[85] Constitutional rulings regarding wealth classifications may

79. U.S. CONST. amend. XXIV.

80. 388 U.S. 1 (1967).

81. *See id.*

82. Shelley v. Kraemer, 334 U.S. 1 (1948).

83. *See id.*

84. DOLORES HAYDEN, BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820–2000, at 283 (2003).

85. Chang, *supra* note 64, at 112–13 (citing David M. Cutler & Edward L. Glaesser, *Are Ghettos Good or Bad?*, 112 Q. J. ECON. 827 (1997), and Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM L. REV. 1965, 1966 (2000)). *But see* Eric Klinenberg, *Bourgeois Dystopias*, NATION, June 28, 2004, at 40 ("The majority of new immigrants, and increasing numbers of African-Americans, gays and the poor, are settling down outside the city lines.").

help encourage such separation by allowing wealth to stand-in for race,[86] but local communities have no legally viable claim for racial distinctiveness qua racial distinctiveness in their communities. In short, this form of cultural cohesion cannot be pursued by a political community using legislative means even with more open national borders that would invariably allow immigrants from Latin American, Asian, and African countries.

The elision between culture and race is especially worrisome given the origin of most immigrants today. Unlike historical patterns from the nineteenth and early twentieth centuries, immigration over the past few decades hails mainly from Mexico, China, India, Vietnam, Philippines, Korea, and the Dominican Republic.[87] As of 2006, of the 12.5% of the U.S. population that were foreign-born, approximately 80% were non-European.[88] Any exclusionary policy, either at national or sub-national levels, produces a pronounced racialized effect even when the legislation does not expressly mention racial categories. While racially neutral policies with racially disparate effects are not prohibited,[89] immigration regulation may pose a special case.[90] Given world populations and economic conditions, those percentages will only skew further in the direction of overwhelming racialized effect. It is possible that at such high percentages, exclusion based on undocumented status would receive heightened judicial scrutiny.[91] Even now, coercive and forceful governmental action intended to reach "only" undocumented migrants has caused general racial profiling, with citizens and legal permanent residents wrongfully detained in immigration enforcement actions.[92]

Like race, religious homogeneity can also contribute significantly to a

86. James v. Valtierra, 402 U.S. 137 (1971) (finding no equal protection violation in a California referendum procedure allowing majoritarian control over public-housing regulations that use wealth classifications, as wealth is not a suspect classification and the California procedure did not target racial minorities per se).

87. Kennedy, *supra* note 64, at 66.

88. PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2006 tbl.6 (2008), http://pewhispanic.org/files/factsheets/foreignborn2006/Table-6.pdf.

89. Washington v. Davis, 426 U.S. 229 (1976) (holding that a disparate racial effect was insufficient to constitute an equal protection claim under the 14th Amendment to the Constitution).

90. *See* George A. Martinez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517 (assessing treatment of race in immigration literature).

91. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (declaring unconstitutional a facially neutral redistricting that led to the elimination of 99% of blacks from a previously mixed electoral district); *cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (declaring unconstitutional a facially race-neutral regulation of laundries because regulation was used to almost exclusively prosecute Chinese-owned laundries).

92. Ryan Gabrielson & Paul Giblin, *Sweeps Break the Rules*, EAST VALLEY TRIBUNE (Mesa, Ariz.), Jul. 11, 2008; Daniel González, *U.S. Citizens Claim Profiling, Join Lawsuit Against Sheriff Arpaio*, AZCENTRAL.COM, Jul. 17, 2008, http://www.azcentral.com/news/articles/2008/07/17/20080717profiling0717.html.

political community's self-perception as unique and distinct.[93] Religion provides a space and time for cultural interaction, informs sexual and ethical mores, and is itself a community institution in which members participate and showcase civic spirit. For many, it can be the primary source of self-identification, superseding national and racial ties.[94] While religious solidarity could contribute significantly to cultural cohesion, religious homogeneity is an impermissible legislative objective for either national or sub-national governments.[95] In fact, religious heterogeneity and a dogged resistance of religious hegemony have kept America unique;[96] our religious distinctiveness stems from the very disparateness religious regulation would undermine. Therefore, even though cultural cohesiveness may well be instrumentally important to a political community's stability and survival, it cannot be achieved through religious mandates.

In their own membership decisions, churches and religious organizations can deny membership to individuals based on an individual's stated religious affiliation.[97] However, beyond the physical building of the house of worship itself and privately-owned land, religious organizations cannot lay claim to exclusive dominion over shared geo-political territory. The Supreme Court struck down such an attempt when it stopped the New York state government from defining a city district so as to allow a specific Jewish sect to exclude outsiders from using the region's schools.[98] A given religious community has a right of association which includes a right to disassociate, or not offer membership to, outsiders who do not share their faith,[99] but this is not

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93. Saudi Arabia and Iran are two examples of countries with strict religious requirements for membership. *See, e.g.*, SAUDI ARABIA CONST. arts. 9, 13, 34.

94. *Cf.* Scheffler, *supra* note 37, at 97.

95. U.S. CONST. amend. I.

96. *The Moment of Truth: In Many Parts of the World, the Right to Change One's Belief Is Under Threat*, ECONOMIST, July 26, 2008, at 29–30 ("The promotion of religious liberty is an axiom of American foreign policy .... But America's religious free-for-all is very much the exception, not the rule, in human history—and increasingly rare ... in the world today.").

97. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (finding no violation of Title VII in a church-run business' refusal to hire outside of its faith); 42 U.S.C. § 2000e-1(a) (2006) (exempting religious organizations from Civil Rights laws, providing in relevant part, "[t]his subchapter shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

98. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (ruling that a N.Y. statute creating a school district with its borders contiguous with the village of Kiryas Joel, an enclave for a particular Jewish sect, violated the Establishment Clause because it intended to allow a religious community to exclude outsiders' access to public institutions).

99. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (ruling that an organization has a First

the equivalent of being able to enclose and insulate a neighborhood or locality from outsiders. A migrant's inability to join a specific religious faith or place of worship does not inhibit the ability of that migrant to reside, or participate economically, in the locality.[100]

Religious communities such as the Mormons[101] are instructive in this regard. Mormons coalesce in a few discreet geographic areas in the U.S, with Salt Lake City, Utah remaining the largest population.[102] Because they have decided to tie their religious community to a large metropolitan area, Mormons cannot control the religious background of those who wish to live as their neighbors. Because they constitute a significant plurality of Utah's population, however, Mormons have successfully incorporated some aspects of their belief system into public policy.[103] These regulations and norms certainly make Utah and Salt Lake City distinct from other political communities, but the Mormons as a religious community have no entitlement to the persistence of these norms based on their religious beliefs. Majoritarian values in the future could overturn these legislative pronouncements if sufficient new members to the Salt Lake City and Utah communities do not adopt the same values as the Mormons.

Moreover, even without constitutional constraints, religious dominance or homogeneity is a non-starter for sub-national communities

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Amendment right of association to deny membership to an individual who undermines the organization's viewpoint).

100. In fact, religious organizations have been the most humane towards migrants in the wake of more visible federal pursuit of undocumented migrants. *See* Samuel G. Freedman, *Immigrants Find Solace After Storm of Arrests*, N.Y. TIMES, July 12, 2008, at A9.

101. "Mormon" is the common name for a member of the Church of Jesus Christ of Latter-Day Saints.

102. David E. Campbell & J. Quin Monson, *Following the Leader?: Mormon Voting on Ballot Propositions* 2 (Notre Dame Univ. Program in Am. Democracy Working Paper Series, Paper No. 16, 2003), *available at* http://americandemocracy.nd.edu/working_papers/files/following_the_leader.pdf.

103. *Id.* at 1–3 (noting instances of Mormon voting affecting political outcomes, and specifically detailing Mormon religious leaders' influence of 1968 Utah liquor law). Mormons make up about 80% of Utah's legislature. Bob Bernick, Jr., *First Step Toward Change in Liquor Law*, DESERET NEWS (Salt Lake City, Utah), May 29, 2008; James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1564 (1997); Stephanie Mencimer, *Theocracy in America*, WASHINGTON MONTHLY, Apr. 2001, at 27. Every member of the congressional delegation was also a LDS member in 2001. Mencimer, *supra*, at 29. These figures are explained by the large majority of Utahans being members of LDS, and the origin of Utah as a Mormon state after their persecution across the rest of the country. McHugh, *supra*, at 1546, 1549, 1564. Even Utah's Constitution, while seeming on the surface to be secular, has many hints at work-arounds of church-state separation requirements. *Id.* at 1516. In 1992, there was an open attempt to break down the barriers between church and state by amending the Utah Constitution to allow prayer before local government meetings. Alfred C. Emory & John J. Flynn, Editorial, *Rush to Amend Utah Constitution Invites Divisive Religious Assault*, SALT LAKE TRIBUNE, May 11, 1992, at A9. This attempt failed, but was directed at amending the portion of Utah's Constitution that was written specifically to allay fears of a Mormon theocracy becoming part of the United States.

responding to increased immigration. In the specific context of undocumented migration into the U.S., religious protectionism appears not to be a significant factor in exclusionary practices by local communities because of demographic considerations. Most immigrants to the U.S., whether undocumented or documented, share a Judeo-Christian background with the majority of the current citizenry.[104] The majority of immigrants generally, and the overwhelming majority of undocumented immigrants specifically, are of Mexican descent and identify themselves as Catholic, an identity shared with 24% of incumbent Americans.[105] Although anti-Catholic vitriol directed mostly at Irish migrants underpinned a significant part of American nativism in the mid-nineteenth century,[106] today Catholics have integrated into the national polity. Current religious antipathy is mostly directed against Muslims,[107] a group accounting for a negligible amount of undocumented migration.[108]

Further, sub-national attempts to limit membership based on religious affiliation would be an odd response to increased immigration. Any exclusion of putative members who share the same underlying religious faith suggests that religion in that instance would be used as mere pretext for developing community cohesion based on race or national origin. Perhaps more fundamentally, other than specific niches of American society, most current citizens are not overly concerned about the religious identity of their nation or their locality.[109] A recent nationwide study on religion in America revealed a trend towards lessening religious fervor, and highly fluid beliefs among Americans.[110] Religion appears to be declining as the basis of community cohesion in

104. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESSES AND POLICY 157–64 (6th ed. 2008); PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. Mexicans, the largest minority population in the United States, and of whom an estimated 25% are undocumented, are overwhelmingly Catholic. PEW FORUM ON RELIGION AND PUB. LIFE, *supra*, at 48.

105. *Id.* at 47–51.

106. Norman L. Friedman, *Nativism*, 28 PHYLON 408 (1967).

107. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

108. Steven A. Camarota, *The Muslim Wave*, 54 NAT'L REV. 24 (2002), *available at* http://www.cis.org/articles/2002/sac830.htm.

109. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 104.

110. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 104, at 5 ("More than one-quarter of American adults (28%) have left the faith in which they were raised in favor of another religion—or no religion at all. If change in affiliation from one type of Protestantism to another is included, roughly 44% of adults have either switched religious affiliation, moved from being unaffiliated with any religion to being affiliated with a particular faith, or dropped any connection to a specific religious tradition altogether."); *id.* at 19 ("the number of Americans who are not affiliated with a religion has grown significantly in recent decades").

American life; if anything, undocumented migration overwhelmingly from one religious background strengthens religious cohesiveness.

Even as homogeneity in race or religion—either as a legislative end or a means—is prohibited by the constitution, sub-national communities may aver to language in their statutes and constitutions as a means of promoting distinctive culture and deterring would be residents. A common language provides a base-level and fundamental commonality that promotes cultural cohesiveness. By allowing members of the community to communicate with little cost, a common language facilitates both social and political interaction amongst incumbent members, which in turn strengthens community bonds.[111] And language, unlike race or national origin, is a mutable characteristic.

Yet, sub-national language restrictions aimed at excluding migrants, however, suffer from several flaws. While laws limiting undocumented immigrant access to local services, housing, and employment facially target only undocumented immigrants, "English as official language" statutes, and "English only" aspirations indiscriminately affect many immigrants and citizens of foreign birth or descent.[112] Because English related public policy affects foreign-born citizens, and documented and undocumented immigrants alike, they merit judicial investigation to determine if cultural preservation is their intended goal, or if they stand as proxies for illegitimate animus. This is especially true because the level of English fluency required to navigate the local political, social, and economic terrain is fairly minimal.[113]

As a constitutional matter, sub-national governments' past attempts at mandating English as the only spoken or taught language have been struck down.[114] Although sub-national regulation cannot exclude outsiders on the basis of language-ability, states and localities can and have expressed English language-use as an aspiration for their communities through "official language" statutes and state constitutional amendments.[115] Historically and recently, laws of this kind have been the response to visible and growing immigrant populations, both legal

111. Chang, *supra* note 64, at 100; *Cf.* Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 CRITICAL INQUIRY 617, 623 (1997).

112. Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 748–51 (2006); *see also* Kotlowitz, *supra* note 8 (noting that citizens and long-time Mexican-American residents of the U.S. are feeling targeted by English-only ordinances).

113. *Cf.* Appiah, *supra* note 111, at 633 & n.20.

114. U.S. CONST. amend. I; Meyer v. Nebraska, 262 U.S. 390, 396 (1923); Bartels v. Iowa, 262 U.S. 404, 409 (1923).

115. *See, e.g.*, ALA. CONST. amend. DIX; CAL. CONST. art. III, § 6(b) (1986); GA. CODE ANN. § 50-3-100 (2008) (creating an official English statute, with broad exceptions to avoid Constitutional violations).

and illegal in those communities.[116] But language in the aspirational sense provides a thin basis for establishing distinctiveness and cohesiveness in a local community. For certain governmental actions, English-only laws would be inhumane, such as in criminal trials with non-English speaking defendants who require translation.

Also, though linguistic homogeneity generally contributes to well-functioning political institutions, it is often not in the government's interest to limit itself or those interacting with it, to one language.[117] Law enforcement and national security concerns are likely better addressed when the government permits itself to speak with, and hear from, individuals who may not speak English.[118] Moreover, English as a secondary or even tertiary language would likely suffice to allow understanding of political systems and institutions.[119] Indeed, if political and civic participation is the goal, rather than mere exclusion, increased language access for non-English speakers is a better path.[120]

Even if sub-national governments are legally prohibited from monolingual policies, privately-owned businesses may choose to interact in English. Their desire to do so makes sense, as communication problems could slow down transactions and require extra work from business owners.[121] In addition, such signage signals to would-be community members that the business owners value their distinctive language more than the marginal dollars they gain from non-English speaking clients. While such action by private businesses produces the intended effect of excluding non-English speakers, any such effect would certainly be temporary, given the English adoption rate by immigrants over time. Polls consistently show that immigrants desire to gain English skills, as it helps them communicate with their children who may use English as their primary tongue, increases their economic opportunities in the marketplace, and allows meaningful political participation.[122] After a few years for the first generation, and by the second and third generations, English adoption and fluency catches up to

116. *See, e.g.*, Kotlowitz, *supra* note 8.

117. Rodriguez, *supra* note 112. Of course, a single language would save administrative costs for governmental institutions. Chang, *supra* note 64, at 104–05.

118. *See* William Finnegan, *The Terrorism Beat: A Reporter at Large*, NEW YORKER, Jul. 25, 2005, at 58 (noting the use of Arabic language translators).

119. Appiah, *supra* note 111, at 633.

120. Rodriguez, *supra* note 112.

121. Jamie Coomarasamy, *Philly Landmark Goes English-only*, BBC NEWS, July 2, 2006, http://news.bbc.co.uk/1/hi/world/americas/5127134.stm.

122. T. Alexander Aleinikoff & Rubén G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 10–12 (1998) (showing rapid linguistic assimilation of immigrants over time).

the native population.[123] Any success achieved by sub-national communities, either through governmental or private action, to insulate themselves from increased immigration through language distinctiveness would, at best, be pyrrhic.

Sub-national entities pursuing cultural cohesiveness through preservation of the dominant cultural status quo are thus placed in a dilemma. Race, religion, and language form three of the most identifiable constituent parts of culture, but are also constitutionally suspect grounds for closure. Attempting to avoid these facially impermissible bases, sub-national entities may instead attempt to exclude based on economic deterrents. As argued below, however, economic homogeneity does little to preserve a unique cultural cohesion for incumbent members.

2. Economic Deterrents to Sub-national Closure

Constrained in their ability to build legal walls with racial, religious, and linguistic bricks, sub-national communities increasingly turn to economic regulation as a proxy for culture-based closure. This section considers the possibility of effecting substantial closure through zoning and economic regulation. First, it evaluates the potential for zoning in ways that maintain the economic character of local communities, arguing that, while it may concentrate wealth, it does very little to preserve a distinct cultural commonality. Second, it considers regulations meant as deterrents to undocumented residency and presence, such as prohibitions on public assistance, employment, and residency. In addition to posing as a proxy for culture-based exclusion, there may be significant economic incentives for closure that constitute independent justifications for barring undocumented immigrants. Still these types of regulations may work too well, expelling documented and undocumented immigrants and decimating the communities that enact such measures.[124] Thus, these measures run the risk of destroying the political community, rather than saving it, taking away the foundation from which to promote either economic prosperity or cultural dominance.

Local zoning prerogatives are long-entrenched powers that localities and neighborhoods have used to separate themselves from other places

123. *Id.* at 12.

124. I want to note, however, that to conclusively make these arguments, this Article requires empirical work that I do not provide. I do not intend to enter the complex debate regarding the economics of undocumented migration. Instead, I note that some sub-national entities that have enacted these restrictive laws are questioning the wisdom of their policy as their economic base has vanished.

and keep undesirable people out.[125] Communities may seek to zone in ways that encourage less affordable housing,[126] limit the number of persons per household, and increase property taxes. Zoning regulations, although imperfect substitutes for outright exclusion, can help hoard economic resources for incumbent community members. In addition, they likely produce a disproportionate effect on undocumented persons. By limiting the pool of potential community residents through zoning, a local community could, for example, reduce the probability that local emergency rooms will be used by anyone, including immigrants, without insurance or financial solvency.[127] Additionally, such regulations may produce collateral effects, such as reducing the number of persons driving without insurance within the locality.[128]

But while this drive to horde resources makes economic sense, from the perspective of maintaining a distinct cultural bond, closure through zoning is a debatable proposition. First and foremost, relying on economic factors to justify local exclusion cedes much of the argument for cultural maintenance through expulsion of migrants. At base, closure on this reasoning relegates culture to nothing more than community wealth protection, and its claim to control over the cultural rate change limited to the empirical probability that migrants will enter and remain destitute.[129]

Zoning barriers may exclude undocumented migrants due to their relative poverty, but they do little to protect or shield an identifiable culture—apart from a culture of wealth—associated with a political community occupying a determined geographic space. Quite simply, the desire to preserve wealth and resource is not distinctive; it could form

125. Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1630 & n.33 (2008); Rick Su, Local Fragmentation as Immigration Regulation 11 (June 10, 2009) (unpublished, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416107) ("By imposing zoning restrictions that prohibit apartments or multi-family developments, or requirements that impose minimum lot sizes or square-footage, communities have used carefully-crafted zoning policies to drive up housing costs and limit housing selection, with the added consequence of pricing out low and sometimes moderate-income residents."); *see also* Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

126. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388–90 (1926).

127. *Illegal Immigrant Births—At Your Expense*, CBS NEWS, Apr. 7, 2008, http://www.cbsnews.com/stories/2008/04/07/eveningnews/main4000401.shtml.

128. *See* Nina Bernstein, *Spitzer Grants Illegal Immigrants Easier Access to Driver's Licenses*, N.Y. TIMES, Sept. 22, 2007, at A1 (noting that N.Y. drivers would save $120 million in insurance premiums by reducing the number of uninsured drivers).

129. While this is likely true for new undocumented migrants who form part of the global labor market in agricultural and meat-packing industries, the same is not true for new migrants (mostly documented or with employment visas) in scientific and technology fields. Vivek Wadhwa et. al., America's New Immigrant Entrepreneurs 4–5 (Duke Science, Technology & Innovation Paper No. 23, 2007), *available at* http://ssrn.com/abstract=990152.

the bond between any individual, from citizens to undocumented persons, and a political community. Fundamentally, people create governing structures at local and national levels to aid in the creation and preservation of economic and public resources, and to effectively regulate the distribution of those resources.[130] The desire to import wealth while exporting costs cannot distinguish one neighborhood from another, one state from another, or one nation from another. This is not to argue that the relative affluence of a community is not or cannot become a cohesive factor; Beverly Hills and the Upper East Side of Manhattan provide ostentatiously easy examples. But, what has distinguished those places is the success with which they have attracted wealth, not the local community's desire to attract wealth and minimize costs. While the distributional concerns regarding increased immigration may spur localities to consider more policies that export costs, sub-national political communities cannot preserve a particular cultural status quo by doing so. They are in fact accessing a universal impulse at all levels of government in all variety of nations to hoard resources for current members. Counterintuitively, under this analysis, a sub-national community engenders a unique bond amongst its members when it decides to oppose the general trend and offer services to all people, including undocumented migrants, without attempting to export the costs to adjacent localities.[131]

More to the point of Walzer's thesis, protectionism through zoning and other economic deterrents occurs both in the presence and absence of strictly controlled national borders. Undoubtedly, neighborhoods have had some success using zoning and gated communities to preserve the economic character of their surroundings.[132] And, public policy that treats the poor unequally, whether documented or undocumented, is generally upheld against constitutional challenges.[133] But, these phenomena also occur during times of low immigration, when undocumented migration is not a prominent fixture in the national agenda. In fact, the first major move of middle income and wealthy whites to the suburbs occurred during a time of relatively low immigration to the U.S., when the immigration code prohibited Asian immigration and kept strict racial quotas on other groups.[134] This

130. *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

131. *See infra* Part III.A (discussing states and localities that have chosen not to exclude undocumented persons).

132. *See generally* Su, *supra* note 125, at 1649–51 (describing the availability of "neutral" regulations of immigration, such as zoning).

133. James v. Valtierra, 402 U.S. 137 (1971).

134. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED

suggests that a sub-national community's desire to maintain property values and limit public assistance payouts will manifest so long as wealth divisions persist in the national community, regardless of immigration.

While zoning ordinances do not directly facially target undocumented persons, the recent surge in immigration related ordinances expressly restrict their access to public assistance, employment, and residency. As with zoning regulations, these restrictions operate as a proxy for cultural maintenance. However, given the complicated economics of undocumented migration in the U.S., some communities may genuinely feel that their exclusionary stance is purely economic and not cultural.[135] As between national and sub-national jurisdictions, undocumented migration arguably produces disparate economic effects which in part likely motivate sub-national entities to legislate.

The economic impact of undocumented migration eludes blanket statements regarding the dysfunction, or alternatively, the windfall migrants contribute to the nation's economic well-being.[136] As nation-states in the international order move to increase free movement of goods, services, and capital, it has become increasingly clear that immigration rules that hinder free movement of labor "distort global markets" and reduce total global welfare.[137] Within the U.S., even as citizens complain of the economic strain and drain of undocumented migrants, credible and voluminous data indicates that at the national level, undocumented migrants add a significant amount to national economic productivity.[138] At the local level, however, the data is mixed. While some reports present net positive or neutral economic effects,[139] others argue that, given uncompensated emergency healthcare costs, law enforcement costs, and other public services, undocumented migrants produce net losses at the local level and exert downward pressure on

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STATES 175 (1985) (citing AMOS H. HAWLEY, THE CHANGING SHAPE OF METROPOLITAN AMERICA: DECONCENTRATION SINCE 1920 (1956)); HAYDEN, *supra* note 84, at 10.

135. Kotlowitz, *supra* note 8.

136. *See, e.g.*, Chang, *supra* note 64, at 93–94; Jacoby, *supra* note 23, at 50; FISCAL POL'Y INST., A PROFILE OF IMMIGRANTS IN THE NEW YORK STATE ECONOMY (2007), http://www.fiscalpolicy.org/publications2007/FPI_ImmReport_WorkingforaBetterLife.pdf; CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE SATE BUDGET AND ECONOMY (2006), http://www.window.state.tx.u s/specialrpt/undocumented.

137. Chang, *supra* note 64, at 94; *see also* Jonathan Todres, *Lessons from the Trade Arena: A Proposal to Change U.S. Immigration Law for the Benefit of U.S. Workers*, 1 SAN DIEGO INT'L L.J. 49, 65 (2000).

138. *See* Jacoby, *supra* note 23, at 54–58 (noting that $7 billion in tax revenue and $154 billion in economic growth was attributable to undocumented persons).

139. *Id.*

wages.[140] The only currently available study undertaken by a sub-national government focused specifically on the economic effects of undocumented immigrants concludes that these migrants "generate more taxes and other revenue than the state spends on them."[141] The Texas Comptroller's report, however, does not document the net costs at the local level.

Assuming, for argument's sake, that some local communities may experience net losses from undocumented migration, especially when expenses are not compensated by state or federal governments, the disjunction between the loci of economic gains and losses would seem to create perverse incentives. The federal government has diminished economic incentive to create strict border policy and restrict migrant flows, while the exact opposite is true at the local level. The recent surge in local and state laws rendering those locales inhospitable for undocumented migrants in part reflects this concentration of costs. These regulations reduce incentives for undocumented immigrants to settle in those localities by criminalizing the renting of property to them, authorizing local police to inquire into immigration status, and penalizing businesses for employing them.[142]

Denial of public goods, services, housing, and employment to undocumented persons can effectively exclude immigrants and minimize cultural rate-change for a political community. Yet this has not always proven to be wise policy. Some local efforts were rebuffed by federal courts,[143] but other communities grew to reconsider their exclusionary laws without legal sanction. They found their tactics worked too well. These sub-national communities are regretting their restrictions on undocumented persons in light of the unforeseen costs.

In 2006, Riverside, New Jersey joined the tide of states and localities legislating to deter undocumented migration and continued presence in their communities.[144] Within one year of enactment, however, Riverside began to reconsider whether its regulations had served its polity's welfare, and repealed them.[145] While the legislation achieved its intended effect—erecting a legal wall around the city and driving out undocumented persons—its collateral and unforeseen consequences devastated the economic and social life of the township. Businesses

140. *Id.*

141. STRAYHORN, *supra* note 136, at 1–2.

142. *See supra* notes 9–15 and accompanying text.

143. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521–29 (M.D. Pa. 2007).

144. Ken Belson & Jill P. Capuzzo, *Towns Rethink Law Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1; Maria Panaritis & Sam Wood, *Riverside To Repeal Immigrant Laws*, PHILADELPHIA INQUIRER, Aug. 23, 2007, at B1.

145. Belson & Capuzzo, *supra* note 144.

closed up, either their proprietors or client-base decimated, and a seemingly thriving town lost much of its vibrancy.[146] Similarly, on a larger sub-national level, the state of Oklahoma is currently reconsidering its restrictive laws. Oklahoma implemented its Taxpayer and Citizen Protection Act of 2007 requiring the verification of employment eligibility using the electronic employment verifications system, which became effective November 1, 2007. Scarcely a month later, a Republican state senator who had supported the bill, initiated an effort to repeal part of the law because of its purported negative economic impact.[147] Industry in many parts of Oklahoma relies heavily on immigrant workers, both documented and undocumented, many of whom left after passage of the law.

The self-inflicted economic woes in the city of Riverside and the state of Oklahoma are, in one sense, proof that a legal fence can be erected—immigrants are effectively kept out, and those already inside are deterred by the inhospitability of their environs. The effectiveness of the legal wall can help incumbent residents slow the rate of immigrant-induced cultural change. Once immigrants leave, however, some sub-national entities have second-guessed the wisdom of their exclusion.[148] It turns out they overstated some of the cultural and economic detriments of the presence of undocumented migration and underestimated the cost of expulsion.

These localities and states realize after exclusion the need to preserve cultural and economic prospects, which they may have miscalculated in five ways. First, they fail to realize the extent to which immigrants constitute critical sectors of the economy, both on the labor side and on the consumer side.[149] Second, although the community's political rhetoric often takes pains to express derision only at undocumented immigrants—and not foreigners or immigrants generally—legislation aimed at undocumented persons is often read as a harbinger of prejudice and xenophobia by lawful immigrants as well.[150] Even documented persons like legal permanent residents know that a key difference between them and U.S. citizens is that they can be deported and

146. *Id.*

147. Mick Hinton, *GOP Senator Wants Part of Law Repealed*, TULSA WORLD, Dec. 5, 2007, at A1, *available at* http://www.tulsaworld.com/news/article.aspx?articleID=071205_1_A1_hGOPs73808.

148. *See, e.g.*, Nick Miroff, *Citing Cost, Prince William Delays Immigrant Measures*, WASH. POST, Oct. 3, 2007, at A1.

149. They constitute a non-negligible part of the national economy. *See generally* Jacoby, *supra* note 23, at 55–59.

150. *See, e.g.*, Kotlowitz, *supra* note 8, at 37 (describing the reaction of Mexican-American U.S. citizens to a political flyer targeting undocumented immigrants, stating "[w]hat so alarmed them is that it felt less like a debate on illegal immigration than it did a condemnation of Hispanic culture").

excluded from community structures in ways that citizens cannot.[151] Since they are not treated as "Americans in Waiting," but rather as contractual beneficiaries whose entitlements can be altered by majoritarian processes,[152] aggressively anti-undocumented-immigrant actions and rhetoric cut dangerously close to anti-immigrant action in general. Third, and relatedly, an estimated 1 in 10 families with children in the U.S. is a "mixed-status" family, made up of documented and undocumented individuals.[153] In response to regulations that exclude their family members, citizens and documented persons of immigrant descent do not place their loyalty to their neighborhood above bonds of blood. Thus, while it is easy for sub-national regulation to facially restrict only undocumented individuals, it is virtually impossible to avoid affecting documented immigrants and citizens.

Fourth, restrictive state and local responses to the lack of new national regulation galvanized coalitions of strange political bedfellows. Mainline civil rights groups, business and industry leaders, local law enforcement, and unions all oppose stringent sub-national regulation.[154] These groups, for disparate reasons, coalesce against the notion of national and sub-national unfriendliness towards undocumented persons, and will likely oppose future measures at both the federal and sub-federal levels. The spectrum of interests opposing exclusion reflects the degree to which undocumented migration has become a part of our national narrative and daily life. Finally, the exodus of undocumented persons, their families, and other immigrants leaves cultural and social voids, demonstrating by absence the influence those persons exerted on the culture of a community. The reality is that if the presence of undocumented immigrants is substantial enough to motivate legislation, it is likely that those persons have already modified community culture and become integral to the stability and survival of that community. The social and cultural space the political community was attempting to protect was one that was always partially constituted by the very people whose exclusion that type of protection mandates.

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151. ALEINIKOFF, ET AL., *supra* note 104, at 689–722 (providing basis for deportation); Foley v. Connelie, 435 U.S. 291 (1978) (allowing a state to exclude non-citizens from serving as state police).

152. HIROSHI MOTOMURA, AMERICANS IN WAITING (2006) (arguing that the U.S. should return to a conception of legal permanent residents as "Americans in Waiting" where they are afforded membership rights similar to national citizens).

153. MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INST., ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM (1999), http://www.urban.org/UploadedPDF/409100.pdf.

154. Krissah Williams, *Labor Groups, Business Seek Immigration Law Overhaul*, WASH. POST, Jan. 20, 2007, at D1 ("Worried that surprise raids are driving away workers who are their lifeblood, businesses are pooling their money and joining unusually broad alliances that include labor unions and civil rights groups to push Congress to overhaul the nation's immigration laws.").

In sum, although sub-national zoning and economic regulation may hinder migrants from crossing sub-national borders, they neither effectively promote cultural cohesion nor do they generally achieve the ends they intend. Moreover, as critiqued in the next section, the recent sub-national regulations are in danger of being declared unconstitutional under the federal plenary power doctrine.

C. Overlapping Membership Communities and Problem of Plenary Federal Power

Thus far, in Parts II.A and II.B, this Article has argued that sub-national closure cannot preserve the cultural status quo, and that communities are restricted to economic deterrents in their attempts to preserve culture through exclusion. This section takes up the economic regulations that are evaluated by courts using the preemption doctrine and federal plenary immigration power. Considering these laws which purport to deny public assistance, employment, and residency to undocumented persons, courts have struck down some exclusionary legislation, but have upheld others.[155] Regardless of the legal outcome, courts have evaluated these regulations in a manner that misunderstands the nature of community membership in the United States. The current judicial conception of power differential between federal and sub-federal entities perpetuates the causal feedback loop between national border control and sub-national reactions. Ultimately, with a more accurate and contemporary understanding of membership, the exclusionary power of both national and sub-national entities should be constrained, eradicating the judicially-created link between national border laxity and sub-national attempts at legal closure.

The crux of my contention here is that the theorized causal link between national border policy and sub-national response does not adequately account for the impact that outdated judicial interpretations exert on the relationship between the multiple levels of political community. Federal plenary immigration power and its operationalization in the preemption doctrine create significant asymmetries between national and sub-national authority vis-à-vis immigrants.[156] Although power differential between federal and sub-

155. *Compare* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521–29 (M.D. Pa. 2007) (striking down ordinance), *with* Gray v. City of Valley Park, No. 4:07-CV-00881, 2008 WL 294294, at *18–19 (E.D. Mo. 2008) (upholding ordinance); *see also* Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22.

156. *See* U.S. CONST. art. I, § 8.

federal entities is an ingrained feature of our constitutional order,[157] its unchecked operation in the field of immigration causes special concern.

Tracing the lineage of the plenary power doctrine from its origins, Professor Stephen Legomsky argues that it grew out of the Supreme Court's improper reliance on prior federalism cases.[158] In essence, the Court was reacting to state excesses from other constitutional areas.

In the immigration arena, however, with no significant judicial check on federal action, the plenary power doctrine has permitted federal excesses. As a historical matter, the federal government is just as likely as sub-federal units to exclude on the basis of ethnic group or national origin in the name of cultural preservation.[159] From 1921 until 1965, the U.S. immigration code expressly excluded migrants from Asian nations,[160] and allowed Mexican immigration under a guest-worker program that limited the legal membership ties those immigrants could develop in the U.S.[161] Underlying restrictive legislation in the first instance were notions about the cultural effect and inadaptability of foreigners from ethnic backgrounds different from the incumbent cultural majority.[162] Although Congress rescinded racial admission quotas with its 1965 Immigration and Naturalization Act, no constitutional or judicial rule prevents a return to that draconian period.[163]

The problem with this asymmetrical evaluation is that it ignores three vital and emerging realities. First, as this Article has already argued, preserving the cultural status quo is a self-defeating proposition.

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157. U.S. CONST. art. IV, cl. 2.

158. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 42–73 (1987).

159. ALEINIKOFF ET AL., *supra* note 104, at 163–76.

160. *Id.*

161. KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992).

162. Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 580–81 (2007) ("[A]lthough we remember exclusions as having been status-based, they were in fact premised upon assumptions about normative behavior.").

163. *See* Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 43 (1996). *But see* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (arguing that phantom norms and interpretation avoiding constitutional holdings have allowed the Supreme Court to avoid some excesses of the plenary power doctrine).

I am not arguing that such an attempt is likely or would be successful. As Dean Kevin Johnson and Professor Bill Ong Hing note, "in light of the modern civil rights consciousness . . . blanket prohibitions on the immigration of certain races or national origins [are not] generally viable." Johnson & Hing, *supra* note 22, at 1350. Even so, a consequence of the plenary power doctrine is nearly unfettered, unchecked decision-making power in the hands of the political branches. Presumably our evolved consciousness, economic deterrents, and foreign policy reprisals would prevent such a return. But, these are prudential cautions, not constitutional constraints on sovereign power.

Cultures will change, especially in this globalized world where migration often ignores formal national boundaries. This ineffable law of cultural evolution applies with equal force at all levels of political community, declining to distinguish local borders from that of the nation-state. Therefore, it makes little sense to permit the federal government to engage in an unconstrained preservationist exercise at the national border, but disallow the same at the sub-national level.

Second, the judicially-created imbalance is itself constitutive of the very phenomena it purports to resolve. While preemption may, in many cases, produce the same result as other possible constitutional bases at the sub-national level,[164] it creates an odd dynamic between federal and non-federal political communities vis-à-vis questions of inclusion and membership. When states and localities believe the federal government can legitimately build high, restrictive walls to exclude outsiders, but does not do so, they fill that void. They view themselves vindicating the extent of the unfulfilled federal exclusionary potential.

Plenary power readings, then, limit the size of the walls sub-national entities can construct, but allows the nation to erect walls—literally and legally—of any height. The effect is to signal that draconian barriers are permissible outlets for the exclusionary impulse of political communities, but then deny the ability to act on that impulse to the level of political community where individuals most acutely experience membership concerns. Sub-national communities, witnessing the wall-building power of the federal government lying fallow, have attempted to erect their own legal borders to the same height that they perceive the nation could. This Article argues, however, that federal power vis-à-vis outsiders should be constrained similarly to sub-national power, reducing the gap between them. Thus, sub-national communities will not view themselves as proxies for unexercised federal authority.

Third, and relatedly, the changing global landscape and increasing importance of both trans-national and sub-national memberships,[165] militate against exclusive reliance on, and unfettered power for, the national political community as the site of cultural connectedness. Plenary national immigration power discounts the importance of the multiple and overlapping memberships that all inhabitants of the U.S.

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164. David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070–73 (1979).

165. Ford, *supra* note 28, at 210 ("[N]ational citizenship[is] under attack, not from one, but from two opposite vectors: one toward multinational and global affiliations that transcend the nation-state, and one toward subnational, regional, and local affiliations that fracture the nation-state."); *see also* Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411 (2007) (arguing that both local and international realms of membership are gaining importance vis-à-vis the national sphere).

possess.[166] Membership, and the desire to distribute it, matters equally at the local level as at the national level.[167] In a rapidly globalizing world and in recent decades that have ushered several free-trade agreements, citizens will seek to find political spaces in which they can exert some control.[168] Increasingly, the city is the locus of these efforts to regain order and control, as national policies skew in favor of free movement of capital and goods and outsourced labor.[169] In recent decades, the U.S. has become more politically and ideologically polarized than before, and such differentiation is reflected in residential and geographic patterns.[170] Concurrently, membership is also expanding internationally, as individuals become a part of transnational movements and organizations,[171] and find protection and prosecution from legal regimes beyond that of the nation-state.[172] When non-national memberships are imbued with these important meanings, it cannot be that the national community accretes significantly more exclusionary power than sub-national ones.

In addition, the citizenry of the neighborhoods, cities, and states enacting legislation meant to exclude undocumented persons are also part of the political community voting for the presidential administration and federal representatives charged with creating national border policy. Inaction at the federal level[173] reflects a combination of the deep national ambivalence towards undocumented migration,[174] the power of interest

166. BOSNIAK, *supra* note 30, at 18–36; Ford, *supra* note 28, at 218 ("The residents of global cities, however, have cultural and economic ties to the global village that can be as strong as their ties to their national capitals.").

167. *Cf.* WALZER, *supra* note 22, at 31 ("The primary good that we distribute to one another is membership in some human community.").

168. Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, CENTENNIAL REV., Summer 2003, at 57–58; Kristine Crane, *The City as an Arena for the Expression of Multiple Identities in the Age of Globalisation and Migration*, (FEEM Working Paper No, 73, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_*Id*=463381.

169. *See generally* Chang, *supra* note 64; Ford, *supra* note 28.

170. BILL BISHOP, THE BIG SORT (2008) (noting increase in "landslide" counties during election time and positing that the polarization of politics is due to a movement of people into like-minded communities resulting in more radicalized beliefs and political views); Kathleen Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799 (2006).

171. *See* sources cited *supra* notes 164, 165.

172. Ford, *supra* note 28, at 218–24; Ramji-Nogales, *supra* note 30, at 324–44. *But see* T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 MICH. J. RACE & L. 241 (1999) (arguing that notions of post-national membership are premature).

173. "Inaction" itself is a temporally limited description. Although Congress failed to come to new legislation in 2006, the federal government has acted comprehensively in regards to immigration in the past. *See* 8 U.S.C. § 1001 (2006); ALEINIKOFF, ET AL., *supra* note 104.

174. *See* PEW HISPANIC CTR., *supra* note 66.

groups,[175] and the incentives created by net federal economic gains. It also signifies that the national political community, acting through representatives, does not consider migration a serious danger to the integrity of American culture. And, nationwide, undocumented migrants constitute only 3% of the population. Although a non-negligible portion of the population, those migrants cannot create drastic or de-stabilizing cultural change in our national political institutions.

The greater concentrations of migrants in local political communities,[176] however, create greater possibility of more acutely felt economic and cultural effects. It is only at the local level, in neighborhoods and cities, where incumbent cultural majorities must share residential, economic, and socio-cultural spaces with those they would rather exclude.[177] The erection of legal entry barriers at the local level is an articulation by local citizenry that their preferences did not find voice on the national stage.[178] Their response then, expresses their belief that, with regards to local distributional welfare and local culture, their more immediate political community takes precedence over the national one. In striking down exclusionary local regulation, however, courts wrongly dictate that the membership decisions of sub-national entities do not matter as much as national membership.

Recent changes in welfare law illustrate the incongruity of this imbalanced judicial understanding of exclusionary power and membership. While sub-national discretion to regulate in the membership and immigration arena has remained constrained by notions of federal plenary power, sub-national decision-making authority with regards to public assistance has greatly increased. The 1996 Personal Responsibility and Work Reorganization Act (PRA) and its accompanying Temporary Assistance for Needy Families (TANF), devolved welfare program decision-making to the state level, including the decision whether to provide benefits to non-citizens.[179] In returning

175. Christian Joppke, *Why Liberal States Accept Unwanted Immigration*, 50 WORLD POL. 266, 273–74 (1998).

176. Ford, *supra* note 28, at 217 ("[M]ajor cities are cultural and political bases for ethnic subgroups and minorities that are too small to gain significant power at the national level.").

177. *Id.*; *see also* Sassen, *supra* note 168, at 57 ("The loss of power at the national level produces the possibility for new forms of power and politics at the subnational level. The national as container of social process and power is cracked. This cracked casing opens up possibilities for a geography of politics that links subnational spaces. Cities are foremost in this new geography. One question this engenders is how and whether we are seeing the formation of new types of politics that localize in these cities."); Crane, *supra* note 168.

178. *See* Chang, *supra* note 64, at 117–18.

179. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001).

control over public assistance programs to sub-national levels,[180] the PRA altered the significance of citizenship and the locus of membership concerns. By devolving control over distributions to states—which in turn could devolve the decision further down to localities—the PRA increased the likelihood that sub-national entities would begin to make membership decisions, attempting to exclude those with whom they did not want to share their collective economic gains.[181]

Against this backdrop of globalization and devolved welfare concerns, a legal rationale that ignores the growing importance of membership distribution at transnational and sub-national levels is too blunt a mechanism. Undocumented migration combined with welfare devolution spurs sub-national closure in ways that it might not have had undocumented migration been paired with the pre-PRA national welfare system.[182] Under the pre-PRA system, a more substantial portion of economic costs and gains from undocumented migrants would be netted at the national level, without disparate concentrations of windfalls and expenditures. In short, localities may not respond to increased national immigration through closure if their public assistance expenditures are compensated from the federal level where gains are recouped.

As the notion of absolute sovereign power wanes and membership at ultra-national and sub-national levels waxes, treatment of undocumented immigrants warrants parameters that mirror international and sub-national standards. However, so long as courts remain incognizant of the importance of multiple membership concerns, they will continue using the preemption doctrine to invalidate local attempts at excluding undocumented persons, but allow the national community the latitude to keep immigration low, build fences, and contemplate guest-worker programs. As courts develop a more realistic understanding of these stratified, but superimposed membership units, they will be forced to develop nuanced tools to measure exclusionary policy at both national and sub-national levels. The likely source of these tools will be developed from general national and international norms regarding the treatment of individuals seeking access to vital rights and benefits, including membership.[183]

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180. *Id.* Note also that federal welfare began in 1935. Prior to that, states and localities controlled public assistance and residency was the primary factor in determining benefits. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (rev. ed., 1996).

181. WALZER, *supra* note 22, at 38.

182. *Id.* ("Where welfare monies are raised and spent locally . . . the local people will seek to exclude newcomers who are likely welfare recipients.").

183. *See* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 948–55 (2007). Also, the ruling in *Lozano v. Hazelton* places in jeopardy similar laws enacted in other localities. Although it might have used equal protection and

Thus, under a legal regime that accounts for the increasing importance of non-national membership arenas, exclusionary potential at all levels should be constrained. Under the current judicial scheme, which bluntly elevates national decision-making over membership, sub-national entities rush to fill the void they perceive to exist when the national community does not fully utilize its exclusionary power. Eliminating the disparity between the levels of governments curbs the discontent some localities feel when they witness inaction at the federal level. Given that the national community, like a sub-national one, cannot preserve cultural status quo through exclusion, and that membership concerns, especially in light of devolved welfare decision-making, matter significantly for sub-national jurisdictions, there should be little disparity between exclusionary possibilities at either level.

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Importantly, the fact that national and sub-national governments are constrained in their ability to pursue cultural distinctiveness need not be an argument for open borders. It does, however, argue for a much more liberal admission policy, bounded by factors that will be discussed in further detail below.[184] This Article has thus far argued that such an immigration policy cannot lead to local closures that seek to preserve culture. First, the goal of cultural preservation is itself elusive, leaving communities with the modest potential to influence the rate of its change. Second, localities are prohibited from seeking closure in ways that preserve the cultural status quo. Part III considers how sub-national communities actually react to increased immigration, and on what basis they may continue to seek cohesion and stability without closure.

III. CULTURAL COHESION AND STABILITY DESPITE MORE OPEN BORDERS

This Article has thus far undermined two critical assumptions of the theory that more open national borders will cause sub-national closures as states and localities seek to preserve the culture and stability of their communities. Part III turns to the third assumption—namely, that closure is the only method by which sub-national entities can attempt to protect their cohesiveness and stability when confronted with increased

due process rationales for its decision, the *Hazelton* court relied on preemption principles instead, ruling that the Hazelton ordinance was unlawful, not because it might have been a proxy for race, led to racial profiling, or purported to deny shelter to human beings, but rather because it affected immigration. *See* 496 F. Supp. 2d 477 (M.D. Pa. 2007).

184. *See infra* Part III.B.

undocumented migration. This section first argues that exclusion and closure at the sub-national level is not an inevitable response to increased immigration. Sub-national reaction has been bi-directional, with some localities producing decidedly anti-immigrant responses, and others extending membership benefits to undocumented residents. Second, subpart III.B maintains that communities can promote cultural cohesion and stability without closure. Those communities highly valuing their particular, temporally-specific cultural status quo, however, can incur significant economic, spatial, and social costs. Finally, subpart III.C sets forth a vision of cultural cohesion that can include both current and future members of our national and sub-national communities, regardless of national citizenship status.

A. Bi-directional Sub-national Legislative Responses

As an empirical matter, the inevitable causal connection between national openness and sub-national closure posited by legal and political theorists is overstated. Over the past few decades, and especially in recent years, as some states and localities have sought to deter undocumented immigrants from entering or remaining within their jurisdictions, others have chosen to ignore and tolerate their presence, while still others have opted to include undocumented residents in their communities. In response to the current federal border policy and lack of congressional action, this last group of localities has found it more desirable to open their gates and include undocumented persons than to find ways to exclude them. Their response belies the contention that increased immigration and a perceived lack of national border enforcement automatically triggers sub-national closures. In addition, their reactions showcase that sub-federal political stability and cohesive communities do not require exclusionary laws intended to deter non-members of the national political community.

During the same time period that a number of cities such as Hazelton, Pennsylvania sought to expel unwanted immigrants through rental and employment regulations, cities such as San Francisco and New Haven proactively facilitated life for all residents regardless of citizenship status.[185] Hazelton's overturned ordinance denied residency and employment to individuals within its borders,[186] purporting to deprive persons of fundamental human necessities. In contrast, the San Francisco and New Haven communities' provision of identity cards to

185. S.F. CAL., ADMIN. CODE § 95.2 (2008) (authorizing the issuance of municipal ID cards); *see* sources cited *supra* note 10.

186. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521–29 (M.D. Pa. 2007).

undocumented migrants provided them the dignity of recognized inclusion, along with other tangible benefits.[187]

Other examples of this bipolarity amongst sub-national entities abound. While many localities have opted-in to the federal immigration enforcement scheme by volunteering their local police force,[188] dozens of cities have enacted sanctuary statutes, signifying that they will not allow local law enforcement personnel to complement federal efforts.[189] Similarly, some states have expressly denied state-college admission to undocumented persons. Ten states, including three of the largest immigrant-receiving states—California, New York, and Texas—allow undocumented persons to attend state universities and receive the same tuition break for which documented in-state residents are eligible.[190] Some of these statutes have been upheld against preemption challenges by opponents.[191]

This bi-directionality adheres even with contested state and local expenditures on public assistance. Post-PRA and TANF, states substantially control the spending of the welfare funds, may supplement federal funds with state monies, and are free to make other critical allocation decisions, such as further devolving power to localities or limiting allocation only to U.S. citizens. Seemingly, permitting sub-national entities the latitude to reduce their public assistance expenditures, especially by discriminating against a group that cannot vote in the political process, would lead to welfare denial in almost all jurisdictions.[192] Although such a reaction remains a possibility, as an empirical matter, we have yet to witness this race to the bottom.[193] Moreover, difference in welfare assistance is not a significant incentive

187. Within the city, identity cards could be used to open bank accounts, and access city services such as libraries. Undoubtedly, identity cards have drawbacks as well. Undocumented persons would be identifying themselves to city officials, and potentially leaving themselves open to discovery of their information through federal subpoena.

188. *See* Immigration and Naturalization Act, 8 U.S.C. § 1357(g) (2006); *see also* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

189. Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing development and use of the word "sanctuary" to describe public and private responses in localities to the presence of undocumented persons); *see also* Sanctuary Cities and States, Illegal Immigrant Information Resource, http://sanctuarycities.info/index.html (last visited Nov. 21, 2008) (providing information regarding sanctuary policies).

190. *See* Miguel Bustillo, *Texas May Pull Up the Welcome Mat*, L.A. TIMES, Feb. 27, 2007, A1.

191. *See, e.g.*, Martinez v. Regents of Univ. of Cal., No. CV 05-2064 (Cal. Super. Ct. Oct. 6, 2006) (denying a preemption challenge to CAL. EDUC. CODE § 68130.5 (2002)). *But see* Martinez v. Regents of Univ. of Cal., 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008).

192. Wishnie, *supra* note 179, at 496.

193. Schuck, *supra* note 20, at 58.

for migration across state lines.[194] In other words, taking advantage of the discretion provided by PRA to disqualify non-citizens will not substantially decrease the rate of immigrants, both documented and undocumented, attempting to enter and reside in a sub-national jurisdiction.

These diametric outcomes at the sub-national level provide some indication of how localities actually respond to borders that are not absolutely controlled. This does not suggest that the border is currently "open."[195] Rather, the disparate local responses to current levels of documented and undocumented immigration which stand at near record levels and public perception of current policy as "broken,"[196] do not produce uniform sub-national reactions in the name of cultural and economic preservation. Specifically, with current levels of migration—including the average 1.8 million estimated documented and undocumented immigrants entering the nation annually—sub-national entities do not uniformly build legal walls to enclose themselves and exclude putative members. Some welcome these new members regardless of their status vis-à-vis the national political community. They do so for a number of reasons, including economic necessity, recognition of community ties developed by migrants, facilitation of local law enforcement, and satisfaction of human and civil rights.

Importantly, these disparate reactions do not disprove the theory that local communities will value and pursue cultural cohesion. They do, however, cast doubt on the corollary that sub-national jurisdictions will do so through closure. After all, as Christian Joppke notes in his assessment of British integration policy, "[Britain] perceives the need to make immigrants and ethnic minorities part of *this* society and not *any* society."[197] In other words, communities seek to be culturally attractive to new members who want to specifically enter that particular community. Those jurisdictions welcoming undocumented migrants are no different; they desire to be culturally cohesive and distinct, but do not

194. Saenz v. Roe, 526 U.S. 489, 505–07 (1999); Sykes, *supra* note 28, at 159 (noting that undocumented persons participate only minimally in entitlement programs).

195. Currently, the U.S. is experiencing its second largest wave of immigration in its history, with the foreign born population in 2006 accounting for 12.57% of total population. The highest point was in 1910 when it stood at 14.7%. *See* PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2007 (2009), http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=45; U.S. Census Bureau, American Community Survey, http://www.census.gov/acs/www/ (last visited Nov. 21, 2008); *see also* Jacoby, *supra* note 23, at 50–58.

196. Rep. Tom Tancredo, *Broken Border Promises*, WASH. TIMES, May 16, 2007, *available at* http://www.washingtontimes.com/news/2007/may/16/20070516-083512-3445r/.

197. Christian Joppke, *Immigration, Citizenship, and the Need for Integration* 12 (U. Penn. Conference on Democracy, Citizenship, and Constitutionalism, 2008), *available at* http://www.sas.upenn.edu/dcc/documents/ImmigrationCitizenshipandtheNeedforIntegration.doc.

understand the inclusion of undocumented persons as antithetical to that goal.

These sub-national communities that either tolerate or ignore the presence of undocumented persons, or open their doors to them, undermine the contention that strict closure must occur at the national level to prevent sub-national closure. Fundamentally, then, the drive to distinguish one's own political community and remain cohesive occurs regardless of the relative openness of the national border. Indeed, for a city like New Haven, the idea of remaining welcoming to undocumented migrants could constitute part of its distinctiveness. When San Francisco provides identity cards for migrants and declares itself a sanctuary city, its municipal government and its voting community are not striving for disunity and destruction of its political order. That is, responding to undocumented migration by including new members and residents has done nothing to render San Francisco's culture any less cohesiveness or less stable.[198] Neither does it signify that San Francisco's political community has abandoned its drive for a particularly attractive cultural affect. Inclusiveness, as well as exclusiveness, can serve that goal.

Cities that do not erect legal barriers to the entry of undocumented persons recognize that their local culture will change. But, the change caused by undocumented migrants is only one part of the cultural evolution that is taking place already within the locality. Those dissatisfied with this alteration, however, may leave the community if the rate of change exceeds their tolerance level.[199] Although many localities have not sought closure as a response to failed efforts at comprehensive national legislation and tighter border control, others may attempt to preserve some measure of their current cultural status quo through self-segregation and disaggregation from their incumbent geographic space.

B. Voluntary Self-Segregation and the Cost of Cultural Status Quo

Despite the opportunity to maintain cultural cohesion and political stability through inclusion, some communities may still desire to minimize the rate of immigrant-induced cultural change. A sub-national community can minimize the rate of change to its current cultural traits, but can do so only if it values those traits more than the monetary and spatial costs of preserving them entails. In the strictest sense, a

198. San Francisco has used other legislative efforts to differentiate itself from other localities and instill pride and cohesiveness in its polity. Both the past performance of gay marriages in San Francisco, and its current stance on the issue have set it apart from many other localities.

199. Chang, *supra* note 64, at 109–13.

community can hope to minimize all incursions into its way of life by abandoning its ambition to remain a political community tied to a specific geographic locale, and choosing instead to remain as a cultural community that does not lay claim to a particular space and its attendant institutions. This Article contends that voluntary self-segregation and its related costs are the sole manner by which sub-national communities within the U.S. can insulate themselves from cultural change produced by immigration. Given the limitations on sub-national exclusion, keeping a cultural community tied to a particular geographic space and its attendant political institutions will increase cultural rate change as immigrants, both documented and undocumented, become neighbors and economic participants alongside incumbents.

Given free choice and movement, individuals will presumably place themselves in the communities which best fit their lifestyle and cultural preferences.[200] Relying partially on Charles Tiebout's model of localities and incentives, Professor Howard Chang argues that free movement serves distinctiveness more than enclosure and restriction at sub-national levels.[201] Movement allows unhindered choices for individuals to move to where the culture best fits them, and allows communities to identify themselves as promoting a particular cultural vision, subject to the limitation on racial, religious, and other impermissible definitions. In some sense, this phenomenon already occurs in the U.S., with most major metropolitan communities housing ethnic and religious enclaves.[202] The critical aspect of these distinctive enclaves is that they are voluntary, and have no claim to excluding others who do not fit into the community's self-professed identity. They allow individuals to choose whether the benefits attendant to residing or working in that community outweigh the costs and detriments of being the cultural minority.[203]

Here, it is useful to distinguish between a cultural community and a political community. A cultural community—for example, a religion, or a particular tribe—maintains an associational right to define its parameters and exclude outsiders who do not meet those criteria.[204] Thus, as a non-Mormon, I have no claim to be recognized as a Mormon by other Mormons unless I satisfactorily meet the requirements to enter

200. *Id.* at 99–104 (citing Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956)).

201. *Id.*

202. *Id.* at 102; *see also* Ford, *supra* note 28, at 216–18.

203. Chang, *supra* note 64, at 109–13.

204. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (ruling that an organization has a First Amendment right of association to deny membership to an individual who undermines the organization's viewpoint).

their community. But, Mormonism exists in the ether; that is, in the U.S. it cannot lay exclusive claim to a political community and governing institutions tied to an expansive, resource-filled geographic space from which outsiders are excluded. In this sense, Mormons have embedded their cultural community inside a larger political community. Thus, we can distinguish the purely cultural community from the political community which seeks to use culture as the barbed wire to keep migrants distant from a resource-filled, labor-hungry, economic opportunity-laden geographic space. A community preoccupied with its specific and current brand of culture may either be concerned with its membership or concerned with its territorial reach. It has no entitlement to lay claim to both simultaneously. More accurately, a community may not lay claim to both through the machinery of the state.[205] The Supreme Court opinion in *Boy Scouts v. Dale*,[206] allowing the Boy Scouts of America to dismiss a gay scoutmaster, for example, only places the government's imprimatur on cultural protection for the non-territorial membership community.[207]

In comparison, religio-cultural communities such as the Amish are able to preserve significant parts of their traditional way of life by regulating membership, but they also voluntarily residentially segregate themselves in remote areas, far from economic centers and national and sub-national political institutions.[208] They do not attempt to participate economically with the general populace, except in limited ways.[209] Groups such as the Mormons or ethnic enclaves within large metropolitan areas, in contrast, can choose not to recognize fellow

205. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (ruling that a N.Y. statute creating a school district with its borders contiguous with the village of Kiryas Joel, an enclave for a particular Jewish sect, violated the Establishment Clause because it intended to allow a religious community to exclude outsiders access to public institutions).

206. *Dale*, 530 U.S. at 640; *see also* Sunder, *supra* note 54, at 524.

207. *Dale*, 530 U.S. at 640.

208. MICHAEL WALZER, ON TOLERATION 68 (1997) (referring to the Supreme Court's ruling in *Wisconsin v. Yoder* which allowed the Amish to forego mandated public school beyond a certain grade, stating "[t]he arrangement is justified in part by the marginality of the Amish, and in part by their embrace of marginality: their deep commitment not to live anywhere except on the margins of American society and not to seek any influence beyond them").

209. *See, e.g.*, DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 254 (1989) ("Few outsiders have chosen to place aside technological convenience and the delights of individualism and submit themselves to the collective order of Amish life. There is a price to being Amish—a price that few outsiders have been willing to pay. It means giving up self-assertive individualism—submitting to the Ordnung, to religious tradition, to the voice of elders, and to communal wisdom. It means foregoing individual preference in many areas—dress, marriage, transportation, education. It means limited mobility, limited occupational choice, and limited possibilities for self-enhancement. It means foregoing many conveniences, restricting social friendships, avoiding many types of leisure, and turning off electronic media. It means, in short, inhabiting a different social world, where the group, rather than the individual, reigns supreme.").

residents as part of their religious or ethnic institutions, but cannot enforce residential separation of those individuals deemed not to be cultural members. Thus, because Mormons have chosen not to geographically segregate themselves and have chosen to participate in governing political and economic structures, they have no claim to exclusion of outsiders to reduce their rate of cultural change.

In this way, the cost of maintaining the cultural status quo acts as the sorting mechanism, able to smoke-out animus-based motives for exclusion of non-incumbent residents. Minimizing the rate of cultural change exacts economic and spatial costs.[210] The Amish subsist in relatively small communities with limited employment opportunities. As Walzer himself notes, Australia's "White Australia" policy could only have persevered in a "Little Australia."[211] That is, communities can sacrifice participation in the national and global economy, and can cede territory to retard the change of their specific cultural status quo, but cannot do so by excluding migrants within the national borders. Importantly, however, even self-segregation cannot preserve the cultural status quo unchanged. As isolated and distinct as the Amish have been, the past several decades have witnessed changes in their cultural practices to account for the reality of technological and communicatory advances in the world around them.[212]

Moreover, even without legal wall-building or self-segregation, groups within the national border have successfully separated themselves ethnically, economically, and ideologically.[213] They do not restrict residential membership, but outsiders unable to partake of the cultural exchanges between members of that community may not desire to join. Applying this model to the localities choosing to exclude undocumented persons teases out the underlying problem that those local community members may be experiencing; their culture may have morphed to one whose most outstanding characteristics are universally shared impulses to achieve greater economic prosperity and live peacefully.[214]

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210. *Id.* Communities can choose not to incur these costs, but then their ability to minimize cultural change is left to chance.

211. WALZER, *supra* note 22, at 47; *see also* John Thompson, *White Australia Has a Black History: Sources for Aboriginal and Torres Strait Islander Studies in the National Library of Australia* (James Cook Univ. of North Queensland Indigenous Research Ethics Conference Paper, 1995), *available at* http://www.nla.gov.au/nla/staffpaper/thomp.html.

212. KRAYBILL, *supra* note 209, at 42–43.

213. BISHOP, *supra* note 170, at 216–17; Chang, *supra* note 64, at 101–02; Ford, *supra* note 28, at 216–18.

214. Joppke, *supra* note 197, at 3 ("I argue that citizenship and integration campaigns are caught in the paradox of universalism: they aim at integrating immigrants into a particular society that is different here from there, but they can do so only in a universalistic diction that dodges the particularism

Faced with the problem of universalism, with 12% of the population foreign-born and 3% undocumented, and disproportionately high concentrations of both groups in specific metropolitan areas, incumbent citizens desirous of avoiding immigrant influences have multiple jurisdictions to which they can relocate to minimize immigrant-influenced cultural change rates. But, if those incumbent citizens otherwise value the financial and other social benefits of their current location, they will have to endure the cost of a cultural rate of change affected by the migrants with whom they share their social, economic, and political institutions. Especially when confronted with the modesty of the attainable goal—marginal reductions in the rate of cultural change—many incumbent residents may find their pursuit of a particular brand of culture an inefficient pursuit.

For those in the cultural majority who remain while their locality begins to include individuals who are not part of the cultural majority, their only entitlement to use governmental institutions and legal mechanisms to stop migrant inflows is triggered when the volume of immigration threatens the well-being of political institutions.[215] At minimum, our constitutional order protects the very institutions and democratic system it enlivens. As Perry explains, however, that point differs for each community, and will be determined by a combination of factors such as relative prosperity, current cultural makeup, population density, and prevailing social and political attitudes.[216] By this measure, the U.S. must allow more liberal immigration at its national border, and by extension, localities must be prepared for greater rates of cultural change.[217] The U.S. remains the largest national economy in the world,[218] with some of its component states also taking top spots in the global economic order.[219] More importantly, on a relative scale, the U.S.-Mexico border remains the highest wealth differential between two states with a contiguous national border.[220] The osmotic pressure to cross the U.S. border, through documented or undocumented means, is so intense that even knowing the chances of death and the probability of

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that they aim at.").

215. *See supra* Part I.B.

216. Perry, *supra* note 22, at 115.

217. *Id.* at 104 ("Once a society has completely met these obligations—and I emphasize that no Western state currently appears to have done so—there is, I wish to suggest, a discretion concerning whether to take in more immigrants.").

218. Central Intelligence Agency, World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Nov. 21, 2008) [hereinafter World Factbook].

219. Legislative Analyst's Office, California Economy and Budget in Perspective, *available at* http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_econ.htm (last visited Nov. 21, 2008).

220. Kennedy, *supra* note 64.

family separation, migration remains inevitable.[221] Concurrently, U.S. population density is relatively low when compared to wealthy and bordering countries, with approximately half the density of Mexico and less than one-tenth the density of India and China.[222] At the local level, even the most densely populated jurisdictions leave room for new members. Notably, many of the issues caused by high population densities are not cultural per se, but are more elemental. Water supplies and air pollution become issues well before political institutions are unable to effectively negotiate the varied cultural differences within local jurisdictions.[223]

When migration meets Professor Perry's multi-factored standard or reaches Professor Chang's hypothesized equilibrium of free labor movement, nations then possess constrained discretion to exclude outsiders.[224] And, at the hypothetical moment when national border policy reflects global realities of free goods, capital, and service movement, and any excess migration would de-stabilize political institutions and the constitutional order, sub-national entities could theoretically also be justified in prohibiting entry into their jurisdictions. Alternatively, if the national community values current levels of immigration and its cultural status quo, it could "pay," in the form of foreign aid, to improve the economic conditions in other nations, thereby dis-incentivizing emigration rates.[225]

Until such time when immigration accelerates cultural rate of change to the point when governing institutions cannot mediate and coerce disparate groups, voluntary self-sorting remains available as a tool to minimize cultural rate change. Engaging in self-segregation, however, may incur significant costs for those who choose to separate in pursuit of a particular cultural iteration. Because incumbent groups have no entitlement to sole possession and governance of a specific territory on which to experience their cultural bond, groups must choose between sharing space in the hopes of maintaining cultural enclaves without coercion, or transplanting themselves from incumbent locales to more remote areas where they can shield themselves from immigrant-induced cultural change. Neither option, however, requires closure and exclusion through public policy.

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221. *See supra* notes 5, 63 and accompanying text.

222. *See* World Factbook, *supra* note 218.

223. Alden Speare, Jr. & Michael J. White, *Optimal City Size and Population Density for the 21st Century* (NPG Forum Series, 1990), *available at* www.npg.org/forum_series/optimal_city_size.htm. Undoubtedly, cultural issues intertwine with environmental ones. It is likely easier to mobilize a more homogeneous population to change behaviors than a culturally disparate one. *Id.*

224. *See* Chang, *supra* note 64, at 127; Perry, *supra* note 22, at 114–15.

225. Perry, *supra* note 22, at 103; *see also* Shachar, *supra* note 48.

C. Shared Political Culture and Common Futures

Although, as this Article maintains, local regulatory attempts at cultural preservation in response to liberal national immigration policies are practically, constitutionally, and economically dubious, national and sub-national communities can still pursue a particular and cohesive American culture and vision. Some sub-national jurisdictions have not responded to current immigration volume and undocumented presence by erecting legal walls. Instead, they have chosen to maintain their cultural bond either despite inclusion, or by inclusion. This section argues that political communities, bereft of their ability to freeze and cryogenically preserve a particular and distinctive cultural manifestation, can still remain bonded enough to ensure political stability. Moreover, national and sub-national communities can foster a joint culture for incumbents and newcomers focused on political institutions and participation, the Constitution, and the common future for all inhabitants. In this way, communities will retain the external benefit that homogenous culture affords—stability in the political, social, and economic institutions that protect individuals' health, safety, and welfare—without having to exclude on constitutionally or economically unviable grounds.

So far, this Article has argued that political communities attempting to preserve their cultural character will only be able to influence the rate at which their culture changes. If majorities in those localities want to limit the ways in which immigrants change their culture, their options are constitutionally proscribed. Other than accepting the inevitability of cultural evolution, the other possibility is for like-minded, culturally homogenous groups to self-segregate and spatially distance themselves from economic centers where migrants may seek residency. It is of course possible that spatial separation and geographic options may be limited, or that the cost of such relocation is prohibitive when compared to the benefits of controlling cultural rate change. Under these circumstances, cultural and political majorities must negotiate the presence of cultural minorities on the same territory by focusing on the shared future that both cultural majorities and minorities will experience.

In part, this version of shared culture that focuses on the future requires a drastic shift in our polity's current definition of culture, and our courts' legal response to that shift.[226] Incumbent members of both national and sub-national American communities must recognize that their culture—indeed any culture—is not a static thing reducible to

226. Sunder, *supra* note 54, at 560.

simple identity markers. Rather, culture is created through interaction among multiple community members, in constant flux, mediating dissent, and experimenting with new possibilities.[227] As Professor Sunder explains, "[w]e are moving away from imposed cultural identities toward a conception of cultural identity based on autonomy, choice, and reason."[228] Starting from this descriptively useful and normatively preferable understanding, communities members will facilitate their process of focusing on shared futures without the constraints of past, static cultural identities. According to Seyla Benhabib, "[t]he continuing identity of a society and culture is based upon its capacity to deal with outside challenges and contingencies while also retaining the belief of its members in its normative systems and value structures."[229]

The arena for reaffirming faith in normative systems and value structures are the institutions of everyday life. When outright exclusion through denial of residency, healthcare, and racial or religious profiling is not an option, both migrants and incumbents must negotiate the same terrain, both physically and politically.[230] On this shared terrain, both incumbents and migrants will interact in economic, social, educational, religious, and political spheres. Of those, our constitutional order mandates individuals comply with the coercive control of political institutions. Even if non-citizens do not vote in local governments, they do actively participate in other community structures such as parents associations at schools and as leaders in religious organizations.[231] In addition, statutes in all fifty states require some amount of schooling, which will by and large takes place in public institutions. Because the children of immigrants, including the children of undocumented migrants, have a right to publicly funded education on equal terms with children of citizens,[232] both incumbents and immigrants have a real stake in educational systems and funding decisions. Local governance structures and educational institutions, therefore, mediate interactions

227. *Id.*

228. *Id.* at 518.

229. *Id.* at 523 (quoting Seyla Benhabib, *Cultural Complexity, Moral Interdependence, and the Global Dialogical Community*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 240 (Martha C. Nussbaum & Jonathan Glover eds., 1995)).

230. Su, Local Fragmentation as Immigration Regulation, *supra* note 125, at 46 ("[L]ocal players and backdrops like those involved in recent immigration controversies like . . . Hazelton are not, as some have suggested, a *new* setting for today's border wars. Rather, they are in some sense, the only scale on which border wars can truly take place.").

231. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–1417 (1993).

232. Plyler v. Doe, 457 U.S. 202 (1982).

between different groups, including both cultural majorities and minorities.[233]

While allowing disparate cultural groups to voluntarily sort themselves into enclaves if they wish, concentrating efforts on our joint political culture and neighborhood institutions will provide sufficient mutual ground to capture many of the benefits of cultural homogeneity. In a democracy that values autonomy of belief and expression as enshrined in the First Amendment, mandating belief and participation in governance structures and governing documents is a significant and reasonable coercive expectation of national and sub-national political communities. Although focus on a common political culture is, in Kwame Anthony Appiah's formulation, "pretty thin gruel,"[234] it is the appropriate consistency for a nation that does not define itself ethnically or religiously, and forbids its sub-national units from using state machinery to accomplish the same.[235] As the noted theorist Jurgen Habermas explains, in a liberal democracy, the social glue necessary for well-functioning communities should be juridical and political, not cultural, geographical, or historical.[236] Put another way, "thick" notions of culture should be anathema to American communities, both national and sub-national.[237]

This Article posits another formulation, adding a dash of thickness to the thin gruel of common belief in a set of political procedures and ideals. Participation, and not just belief, in the communal institutions responsible for all individuals regardless of citizenship status is the critical component. Collective interaction in these local and community institutions is necessary because it helps cement a common identity and culture that is more tangible and experiential than asking individuals to believe in the abstractions of constitutional patriotism. The shared commitment to a procedural framework for equality and pluralism

233. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that Hialeah's ordinance prohibiting ritual animal sacrifice was violative of the Free Exercise clause because it targeted a specific religious minority).

234. Appiah, *supra* note 111, at 630. *But see* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (suggesting that procedural liberalism insufficient for social unity).

235. *But see* Angel R. Oquendo, *National Culture in Post-National Societies*, 50 VILL. L. REV. 963, 975 (2005) ("It is also difficult to achieve social integration solely on the basis of a political culture. Solidarity usually requires more than a common set of political principles.").

236. Joppke, *supra* note 197, at 6 (quoting JURGEN HABERMAS, EINE ART SCHADENSABWICKLUNG (1987)).

237. *Cf.* Oquendo, *supra* note 235, at 967–68 ("When the state posits a particular 'thick' national culture for the entire country, it usually focuses on a particular (almost invariably majority) segment of the society. Even if the state tries to be as inclusive as possible, it typically excludes certain elements in order to give some coherence to the concept of a national culture.").

provides a solid foundation for community cohesiveness, but what will keep individuals bonded over time are the substantive outcomes of interactions, compromises, and understandings which they will experience while negotiating in shared institutions like mosques, schools, and recreation centers. It is also in these institutions where communities will experience the "cultural dissent" that will inevitably modify and evolve their local cultures.

Past attempts to map this unity onto the status of nation-state "citizenship" break down in globalized systems of free movement of goods, services, capital, and labor.[238] While there is no mistaking the importance of U.S. citizenship for the rights, benefits, and life opportunities it affords,[239] the nation-state is no longer necessarily the sole source of rights, protection, and belonging for individuals within it.[240] It is for this reason that outsiders from the perspective of national immigration policy are nevertheless treated as insiders and members by residents of sub-national communities who have developed strong ties and negotiated economic, social, educational, and governing institutions with non-citizens.[241] Objecting to the federal fence-building project, towns along the U.S.-Mexico border openly mock the need to build walls to separate border communities.[242] To many, the evolving and intertwined cultures and economies of the border towns, rich with migrants, is more immediate and necessary than national delineations of who should be considered a member and who should not.

This is not to discount the importance of the national unit.[243] The national political community, to the extent nation-states remain entrenched in the international order,[244] helps enlarge the common economic market and provide for security. Assuming that a truly globalized economic market is unattainable so long as nation-states remain committed to immigration regulation which distorts labor movement,[245] the localized ideas of economic success must give way to

238. Sassen, *supra* note 168, at 57–58.

239. Shachar, *supra* note 48, at 379.

240. BOSNIAK, *supra* note 30.

241. Raskin, *supra* note 231, at 1397–1417 (noting non-citizen activity on school boards and local government).

242. *See* sources cited *supra* notes 2–3.

243. *See* Shachar, *supra* note 48, at 379 (noting that the arbitrariness of birth on one side of a national border will significantly determine prospects for economic and educational opportunities).

244. Stephen H. Legomsky, Comment, *Why Citizenship?*, 35 VA. J. INT'L L. 279 (1994) (considering reasons why citizenship in nation-states may be important and arguing that the current international order justifies the use of citizenship).

245. Chang, *supra* note 64, at 93–97.

national considerations of free movement.[246] Similarly, national political communities should remain vigilant about security threats to the populace, and highly regulate entry of those that would undermine or oppose the constitutional structure and political institutions of national and sub-national communities.[247] Here, the requirement of shared faith and participation in governing institutions has bite. One cannot and should not be given entry to national or sub-national jurisdictions if one's goal is to destabilize those institutions;[248] that individual would not share a belief in the communal political culture for jointly shaping the shared future of individuals from disparate ethnic, religious, and linguistic backgrounds.

CONCLUSION

Currently, the federal polity and several states and localities are construction zones. As the national political community builds a fence at a portion of its south-western border, sub-national political communities are busy erecting legal walls meant to exclude and deter immigrants, especially undocumented ones. Yet, these barriers cannot accomplish what they purport to achieve—faithfully preserving the cultural status quo. While cultural connectedness increases community cohesiveness and helps ensure long-term stability, jurisdictions that have chosen not to build walls, or have chosen to construct welcoming bridges, demonstrate that inclusion can also facilitate cohesive and stable communities. By accepting new members and including them in the shared project of developing a joint future within local and national political units, both national and sub-national communities can better serve the needs of a globalized future, economic welfare, and national security. Undermining one of the justifications for strict national border control and enforcement, this Article ultimately proffers that cultural preservation, and protection of that culture from immigrant influence, is not a worthwhile or legitimate aim of public policy. While individuals and groups are free to attempt to maintain their cultural traits through voluntary isolation, an evolving and distinct political culture that can

246. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. art. I, § 8, cl. 3; Saenz v. Roe, 526 U.S. 489 (1999). The trade jealousies between states were one of the motivating reasons for abandoning the Articles of Confederation in favor of the Constitution. L. BRADFORD PRINCE, THE ARTICLES OF CONFEDERATION VS. THE CONSTITUTION 10–12 (Harvard Univ. Press 1867).

247. *See* Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, *supra* note 23.

248. Perry, *supra* note 22, at 114.

include both incumbents and immigrants is the key to a prosperous and common future.